Supreme Court, U.S.
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No. 09-1569

IN THE

Supreme Court of the United States

SYLVIA BAPTE, Individually and as personal representative of the Estate of Christiane Bapte, deceased, STEPHANIE ISABELLE BAPTE, MARYVONNE BAPTE, et al.,

Petitioners,

—v.—

WEST CARIBBEAN AIRWAYS, a Colombian corporation, NEWVAC CORPORATION, a Florida corporation, GO 2 GALAXY, INC., a Florida corporation,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When 28 U.S.C. §1369 of the Multi-Party Multi-Forum Trial Jurisdiction Act (the "MMTJA") required that all claims arising from a mass accident be consolidated into a single, federal Multi-District Litigation proceeding, did the Eleventh Circuit Court of Appeals commit reversible error in affirming the District Court's Order which denied Petitioners' request for Rule 60(b)(5) and (6) relief and prevented them from joining a subsequently established MMTJA proceeding established by the Crew of the same plane crash in the District Court?

2. Did the Eleventh Circuit Court of Appeals commit reversible error by refusing to grant victims of the same aviation disaster access to similar relief in the same District Court by allowing the District Court to segregate the claims brought on behalf of the Passengers and Crew of the same doomed flight into separate proceedings, by refusing to notify an MDL Panel and by then refusing to grant Petitioners relief from a *forum non conveniens* dismissal after the District Court denied dismissal of the Crew on *forum non conveniens* grounds?

LIST OF PARTIES

Petitioners:

Petitioners are the representatives of 102 of the 152 passengers who perished in the crash of Flight 708 on August 16, 2005. Each Petitioner is a natural person and resident of the Republic of France, Department of Martinique. The list of parties are contained in a separate letter filed with the Court.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	vi
OPINION BELOW	1
BASIS FOR JURISDICTION IN THIS COURT	1
TREATIES AND STATUTES INVOVED	2
STATEMENT OF THE CASE	5
ARGUMENT FOR GRANTING THE WRIT	12
I.A. This Court should grant certiorari to resolve not only a conflict with the letter and intent of the MMTJA, but also a conflict with decisions from the Tenth Circuit Court of Appeals and a prior decision from the United States Supreme Court	12

PAGE

B. The Circuit Court's denial of Rule 60(b) Relief conflicted with decisions from this Court and from the Tenth Circuit Court of Appeals. 20

CONCLUSION 24

APPENDIX

Opinion of the United States Court of Appeals for the Eleventh Circuit dated March 25, 2010 in the matter of Sylvia Bapte, et al. v. West Caribbean Airways, et al., United States Court of Appeals for the Eleventh Circuit Court Case No. 09-15175. ..... 1a

Order on Motion for Rule 60(b) Relief dated September 11, 2009 in the matter of In Re: West Caribbean Airways, S.A. United States District Court Southern District of Florida Case No. 06-22748-CIV UNGARO. 5a

Order Denying Defendants' Motion to Dismiss on the Grounds of *Forum Non Conveniens* dated May 13, 2009 in the matter of In re: West Carribean Crew Members, United States District Court Southern District of Florida Case No. 07-22015-CIV-UNGARO. 12a

PAGE

Order to Clarify Order of Dismissal dated December 7, 2007 in the matter of Re: West Caribbean Airways, S.A., United States District Court Southern District of Florida Case No. 06-22748-UNGARO. 34a

Order Granting Defendants' Motion to Dismiss on Grounds of For[sic] *Forum Non Conveniens* dated November 7, 2007 in the matter of In Re: West Caribbean Airways, S.A., et al. United States District Court Southern District of Florida Case No. 06-22748-CIV UNGARO 36a

TABLE OF AUTHORITIES

Cases PAGE

Agostini v. Felton,
521 U.S. 203 (1997) 22

Boughner v. Sec'y of Health, Educ. & Welfare, 572 F.2d 976 (3d Cir.1978). 21

Case v. Anpac Louisiana Ins. Co.,
466 F.Supp. 2d 781 (E.D. La. 2006) 13

Coltec Ind., Inc. v. Hobgood,
280 F.3d 262 (3d Cir. 2002) 21

Contact Lumber Co. v. P.T. Moges Shipping Co. Ltd.,
918 F.2d 1446 (9th Cir. 1990)..... 15

DirecTV, Inc. v. Brown,
371 F.3d 814 (11th Cir. 2004)..... 19

Gondeck v. Pan Am. World Airways, Inc.,
382 U.S. 25 (1965) 1, 12, 21, 23

Gore v. U.S.,
171 F.Supp. 136 (D.C. Cir. 1959) 14

Legal Env. Assistance Found., Inc. v. U.S. EPA, 118 F.3d 1467
(11th Cir. 1997) 19

Ms. Rigg, Ltd., LLC v. LaFayette Ins. Co.,
2007 WL 1300474 (E.D. La. 2007) 15

Noncommissioned Officers Assn. of the U.S. v. Army Times Publishing Co.,
637 F.2d 372 (5th Cir.1981),
mod. on other grounds and reinstated,
650 F.2d 83 (5th Cir.1981) 14

PAGE

Passa v. Derderian, 308 F.Supp.2d 43 (D.C. R.I. 2004) 16

Pierce v. Cook & Co., 518 F.2d 720 (10th Cir. 1975) 12, 22, 23

Radack v. Norwegian Am. Line Agency, Inc., 318 F.2d 538 (2d Cir. 1963) 21

Ritter v. Smith,811 F.2d 1398 (11th Cir. 1987) 22

Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992) 22

Safe Flight Instrument Corp. v. United Control Corp., 576 F.2d 1340 (9th Cir. 1978)..... 20

System Federation v. Wright, 364 U.S. 642 (1961) 20

Tsakonites v. Transpacific Carriers Corp., 322 F.Supp. 722 (S.D.N.Y. 1970) 21, 22

U.S. v. Acord, 209 F.2d 709 (10th Cir. 1954) 14

U.S. v. Ohio Power Co., 353 U.S. 98 (1957) 21

U.S. v. Swift & Co., 286 U.S. 106 (1932) 20

Wallace v. Louisiana Citizens Prop. Ins., 444 F.3d 697 (5th Cir. 2006) 13, 15

PAGE

Statutes

28 U.S.C. §1254 ..... 1, 2

28 U.S.C. §1369 ..... *passim*

28 U.S.C. §1407 14

28 U.S.C. §1441 14

28 U.S.C. §1697 13

28 U.S.C. §1785 13

Other

The Convention For The Unification Of Certain Rules For International Carriage By Air (the "1999 Montreal Convention") ..... *passim*

Congress and the Multiparty, Multiforum Trial Jurisdiction Action of 2002: Meaningful Reform or a Comedy of Errors, Rafoth, A., 54 Duke L.J. 255, 257-260 (2004) 8, 19

Construction and Application of Multi-Party, Multi-Forum, Trial Jurisdiction Act of 2002 (MMTJA), 28 U.S.C. §1369, Karnezis, Kristine, C., J.D., 32 ALR Fed. 2d 263. 15

H.R. Rep. No. 107-14 (2001) 13, 15, 16

Rules

Fed. R. Civ. P. 60 ..... *passim*

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Eleventh Circuit in this action.

OPINION BELOW

The Appeals Court decision below is a "Do Not Publish" decision reprinted in the Appendix at App. 1.

BASIS FOR JURISDICTION IN THIS COURT

Petitioners invoke certiorari jurisdiction pursuant to 28 U.S.C. §1254(1).

The Eleventh Circuit Court of Appeals rendered its opinion on March 25, 2010. This Petition is timely filed within 90 days of March 25, 2010.

The Eleventh Circuit Court of Appeals' decision conflicts with *Gondeck v. Pan Am. World Airways, Inc.*, 382 U.S. 25 (1965) and *Pierce v. Cook & Co.*, 518 F.2d 720 (10th Cir. 1975). The Eleventh Circuit Court of Appeals' decision below contrued the MMTJA as merely a jurisdictional act and significantly curtailed the Congressional intent behind the enactment of this significant catastrophic disaster legislation by denying Petitioners the full benefit and due process of the statutory scheme passed by Congress for their benefit.

Pursuant to Supreme Court Rule 14 1(e), Petitioner provides the following specific information:

(i) Date of judgment or order sought to be reviewed was entered:

March 25, 2010, by the United States Court of Appeals for the Eleventh Circuit

(ii) Date of any order respecting rehearing/ extension of time:

None

(iii) Rule 12.5 considerations:

Not applicable to this Petition

(iv) Statutory provision conferring jurisdiction:

28 U.S.C. §1254(1)

(v) Rule 29.4 statement:

Not applicable to this Petition

STATUTE INVOLVED

28 U.S.C. §1369. Multiparty, multiforum jurisdiction:

(a) In General.—The district courts shall have original jurisdiction of any civil action involving minimal diversity between adverse parties that arises from a single accident, where at least 75 natural persons have died in the accident at a discrete location, if—

(1) a defendant resides in a State and a substantial part of the accident took place in another State or other location, regardless of whether that defendant is also a resident of the State where a substantial part of the accident took place;

(2) any two defendants reside in different States, regardless of whether such defendants are also residents of the same State or States; or

(3) substantial parts of the accident took place in different States.

(b) Limitation of Jurisdiction of District Courts.—The district court shall abstain from hearing any civil action described in subsection (a) in which—

(1) the substantial majority of all plaintiffs are citizens of a single State of which the primary defendants are also citizens; and

(2) the claims asserted will be governed primarily by the laws of that State.

(c) Special Rules and Definitions.—For purposes of this section—

(1) minimal diversity exists between adverse parties if any party is a citizen of a State and any adverse party is a citizen of another State, a citizen or subject of a foreign state, or a foreign state as defined in section 1603 (a) of this title;

(2) a corporation is deemed to be a citizen of any State, and a citizen or subject of any foreign state, in which it is incorporated or has its principal place of business, and is deemed to be a resident of any State in which it is incorporated or licensed to do business or is doing business;

(3) the term "injury" means—

(A) physical harm to a natural person; and

(B) physical damage to or destruction of tangible property, but only if physical harm described in subparagraph (A) exists;

(4) the term "accident" means a sudden accident, or a natural event culminating in an accident, that results in death incurred at a discrete location by at least 75 natural persons; and

(5) the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(d) Intervening Parties.—In any action in a district court which is or could have been brought, in whole or in part, under this section, any person with a claim arising from the accident described in subsection (a) shall be permitted to intervene as a party plaintiff in the action, even if that person could not have brought an action in a district court as an original matter.

(e) Notification of Judicial Panel on Multidistrict Litigation.—A district court in which an action under this section is pending shall promptly notify the judicial panel on multidistrict litigation of the pendency of the action.

STATEMENT OF THE CASE

The cornerstone of American Justice is our notion of Fundamental Fairness and that everyone who enters an American courtroom will be treated fairly, equally and afforded the full due process of the law. This did not happen below as the personal representatives of the Colombian Crew of Flight 708 were allowed to bring and maintain an action in the District Court while the claims brought by the personal representatives of the French Passengers who also perished on the flight were dismissed on *forum non conveniens* grounds. The instant is a case of first impression before this Court involving the Multi-Party Multi-Forum Trial Jurisdiction Act ("MMTJA"), 28 U.S.C. §1369, passed by Congress in the wake of the September 11, 2001 attacks in New York City. This action will also be the first of many proceedings which will render the MMTJA meaningless if the lower Courts' rulings are allowed to stand. With the MMTJA applicable only to litigation involving catastrophic accidents resulting in the deaths of 75 or more people, its construction will have significant ramifications for the victims of future disasters beyond the instant case. In 2002 Congress enacted the MMTJA as part of a comprehensive scheme to consolidate all claims arising from a catastrophic accident into a single federal proceeding with the intent of affording victims of the same disaster uniform redress and results. But, the Courts below have misinterpreted the MMTJA as "simply" another jurisdictional act and they have disregarded specific provisions of the MMTJA which would have afforded Petitioners the same relief granted

the Crew. The end result was the creation of multiple proceedings in different countries to adjudicate the related claims brought on behalf of the victims of the same aviation disaster. Such a result was completely contrary to the very purpose and spirit of the MMTJA. By reducing the MMTJA to "simply" a jurisdictional act, the Courts below emasculated the MMTJA and denied Petitioners their day in Court while allowing the Crew to proceed, producing exactly the type of non-uniform results that the MMTJA was enacted to prevent.

On August 16, 2005, West Caribbean Airlines ("WCA") Flight 708 fell into a nosedive and incinerated on impact near Maracaibo, Venezuela. All 152 Passengers and the 8 crew members were killed. Petitioners represent 102 of the passenger representatives who on December 4, 2006 filed Montreal Convention claims against the carrier, Newvac, in the District Court in and for South Florida where Newvac's home office was located. Since there were two other smaller groups of passengers who also filed lawsuits, the District Court consolidated all passenger cases into one proceeding ("The Passenger Case"). Although the District Court has stated that it was at all times exercising 28 U.S.C. §1369 jurisdiction [App. 1, App. 2], the District Court never notified the Judicial Panel on Multi-District Litigation of this mass accident despite the requirements of 28 U.S.C. §1369(e) to do so. In August of 2007, representatives of seven of the crew members also filed lawsuits in the Southern District of Florida. Approximately two weeks later, the crew case defendants moved to consolidate the crew cases while the crew moved to consolidate all claims

from Flight 708 into one proceeding. Despite the crew's advocacy for litigating their claims with the passengers in one unified proceeding for all claims of the Flight 708 victims, the District Court *separately* consolidated the seven crew members lawsuits into a second Flight 708 parallel proceeding ("The Crew Case").

After it established separate proceedings for the Passengers and Crew, the District Court then began treating each proceeding as independent and unrelated. On November 9, 2007, the District Court dismissed the Passenger Case for *forum non conveniens* [the "Passenger FNC Order"] and directed the Petitioners to litigate their claims in Martinique, France. On May 13, 2009, the same District Court denied a second *forum non conveniens* challenge to the Crew Case [the "Crew FNC Order"] and allowed the crew to proceed with their claims in the District Court which created the wrinkle in this case. Not only was it patently unfair to have dismissed the Passengers to Martinique while allowing the crew to litigate in the United States, but by allowing the Crew Members to remain, the District Court (and the Circuit Court) failed to acknowledge that the ruling which allowed the Crew to proceed in the District Court also established a 28 U.S.C. §1369 'anchor' MMTJA proceeding which then allowed every other person damaged as a result of the same accident to bring their claims, no matter the type or cause of action, into the one unified District Court proceeding, as Congress intended when it passed the MMTJA.

In light of the MMTJA and the Congressional intent behind its enactment, requiring claims from the same accident to be adjudicated together,

the District Court's exercise of jurisdiction over the Crew Member's litigation was an exceptional change in circumstances. It rendered the FNC dismissal of the Passenger claims contrary to 28 U.S.C. §1369 and therefore inequitable and unjust, justifying the grant of relief under Rule 60(b)(5) and (6). The rejection of FNC for the Crew drastically changed the circumstances surrounding the previous FNC dismissal of Petitioners' case because it, for the first time, established a §1369 action for all who died in the Flight 708 accident. This decision was significant because 28 U.S.C. §1369(d) grants those affected by a qualifying accident (or as here the decedents on board the plane) the right to immediate and mandatory[1] intervention into the §1369 proceeding.[2] This mandatory intervention under the statute extends even to those Petitioners "who could not have brought the claims in the District Court as an original matter" as the Petitioners were not able to do so as evidenced by their prior FNC dismissal.[3]

[1] 28 U.S.C. §1369 provides: "**(d) Intervening Parties.** In any action in a district court which is or could have been brought, in whole or in part, under this section, any person with a claim arising from the accident described in subsection (a) shall be permitted to intervene as a party plaintiff in the action, even if that person could not have brought an action in a district court as an original matter."

[2] *See Congress and the Multiparty, Multiforum Trial Jurisdiction Action of 2002: Meaningful Reform or a Comedy of Errors*, Rafoth, A., 54 Duke L.J. 255, 257-260 (2004).

[3] The District Court was required to inform the MDL panel of the pending 28 U.S.C. §1369 proceeding involving Flight 708 either at filing or after disposing of this last FNC challenge to the Crew case, but the District court did not do

Once the Crew Members jurisdictionally established a §1369 proceeding in the District Court, Petitioners filed their Rule 60(b) Motion for Relief asking the District Court to grant relief from the prior FNC Order dismissing their case. Petitioners contended not only that the May 13, 2009 Crew FNC Order created a shift in circumstances surrounding the rendition of the Passenger FNC Order of dismissal, but also that the continued application of the Passenger FNC Order would be inequitable, inconsistent with the relief afforded to the Crew, and contrary to the MMTJA. As such, equitable relief under Rule 60(b)(5) and/or (6) was in Order and justified. Petitioners requested Rule 60(b) relief so they could then consolidate/intervene their Montreal Convention claims into the Crew's §1369 action. Pursuant to the broad language of §1369(d), as they could not advance their claims as an original proceeding, Petitioners urged the District Court to allow intervention and to consider case law predating the MMTJA which also favored the grant of relief under Rule 60(b)(5) and (6) in order to harmonize the remedies available to victims of the same disaster. The District Court ultimately rebuffed Petitioners when it determined that it did not have jurisdiction to grant relief and announced that even if it had jurisdiction, it still would treat victims of the same plane crash differently because the MMTJA was "simply" a jurisdictional statute. [App. 1, App. 2]. The Dis-

so. Neither did the District Court allow the Crew to consolidate into the Passenger case, nor did the District court allow Rule 60(b) relief of the previously dismissed Passenger Montreal claims so that the Passengers could intervene into the Crew members §1369 anchor proceeding.

trict Court never addressed the specific provisions of 28 U.S.C. §1369, raised by Petitioners, including whether an anchor proceeding was established, whether intervention was available, whether consolidation should have taken place or the intent of Congress behind the MMTJA. Ultimately, the District Court never elaborated as to why it denied Petitioners' their due process under the MMTJA.[4]

On review, the Eleventh Circuit Court of Appeals held that the District Court erred and that it had jurisdiction to entertain Petitioners' Motion for Rule 60(b) Relief. [App. 5]. But, the Eleventh Circuit nonetheless found harmless error and affirmed the remainder of the District Court's Order under review in its Opinion entered on March 25, 2010. It accepted the District Court's reasoning that the MMTJA "simply" provided a

[4] It was unfortunate that the District Court in its Order on Motion for 60(B) Relief felt that the Motion was meant to 'subvert' the Court's prior Order of dismissal of the Passenger Case but it was the District Court which chose to treat the Passengers and Crew differently. When the District Court denied FNC dismissal of the Crew Case, it established an anchor proceeding under §1369 which, by the very language included by Congress in the MMTJA (". . . even if that person could not have brought the action in the District Court as an original matter . . .") allowed the Passengers to then intervene into the Crew Members' action. The Passengers sought no more than what Congress provided and despite inviting the District Court to address the specifics of 28 U.S.C. §1369 and the Congressional intent behind same, which would have given the Passengers their day in Court, the District Court below simply sidestepped any such analysis and called the MMTJA just another jurisdiction 'Act' and accused the Petitioners of subversion. [App. 2].

basis for jurisdiction and the District Court's proposition that the District Court had been exercising MMTJA jurisdiction over all Flight 708 litigation from the beginning. These appeals would not have been necessary had the claims brought on behalf of the passengers and crew of Flight 708 been consolidated into one proceeding and given equal treatment under 28 U.S.C. §1369, which is all that the Petitioners have ever sought.

The procedural history of the Flight 708 litigation allowed the Crew to remain in the District Court—where they ended up settling their claims after these appellate proceedings were well underway--while Petitioners have been dismissed to Martinique to recover nominal damages. The disparate treatment, the multiple fora, the due process denial of not allowing the Passengers to avail themselves to the relief afforded under the MMTJA and the likely chance of inconsistent relief mandates relief.

ARGUMENT FOR GRANTING THE WRIT

I.

A. This Court should grant certiorari to resolve not only a conflict with the letter and intent of the MMTJA, but also a conflict with decisions from the Tenth Circuit Court of Appeals and a prior decision from the United States Supreme Court.

This case likely presents the first opportunity for this Court to interpret the MMTJA and to determine whether the MMTJA requires all cases and all claims that arise from a single catastrophic event to be consolidated into a single Federal Court proceeding and tried together. In so doing, this Court can address the application of the MMTJA, consider the interplay between the MMTJA and *forum non conveniens*, and adjudicate the issues of consolidation and mandatory intervention following a District Court's acceptance of a §1369 action in a mass accident case. Ultimately, the Court can consider whether the decision below, either as a case of first impression under the MMTJA or as a result of conflict with *Gondeck v. Pan Am. World Airways, Inc.*, 382 U.S. 25 (1965) and *Pierce v. Cook & Co.*, 518 F.2d 720 (10th Cir. 1975), gives rise to the issuance of a Writ of Certiorari relating to Rule 60(b) relief.

Congress enacted the MMTJA in 2002 to facilitate the joint adjudication of all claims resulting from a single catastrophic accident that results in the deaths of more than 75 people. The

MMTJA facilitates the assembly of one federal proceeding in order to prevent the inequities that often result from scattered multiparty, multiforum litigations. *Wallace v. Louisiana Citizens Prop. Ins.*, 444 F.3d 697, 402 (5th Cir. 2006). The MMTJA, therefore, was intended to curb the inefficient use of judicial resources, to promote the just resolution of claims, and to prevent conflicting or inconsistent judgments from occurring after a single mass accident.[5] *Case v. Anpac Louisiana Ins. Co.*, 466 F.Supp. 2d 781 (E.D. La. 2006).[6] Ultimately, Congress intended to have one litigation result in one judgment following a single, catastrophic accident. The cornerstone for establishing such a unified proceeding was the inclusion of all affected parties into one action. To allow for consolidation of all claims into one MMTJA proceeding, Congress relaxed the diversity requirements (28 U.S.C. §1369(a), (c)), facilitated the removal of state court

[5] "H.R. 860 would allow a designated U.S district court (a so-called 'transferee court') under the multidistrict litigation statute to retain jurisdiction over referred cases for purposes of determining liability and punitive damages, or to send them back to the original courts from which they were transferred. In addition, the legislation would streamline the process by which multidistrict litigation governing disasters are adjudicated. The bill would save litigants time and money, but would not interfere with jury verdicts or compensation rates for attorneys." H.R. Rep. No. 107-14 at 2 (2001) [*fn. omitted*].

[6] The MMTJA also provides Federal Courts with the authority for worldwide service of process (28 U.S.C. §1697) and of subpoenas (28 U.S.C §1785) for hearings and trial, provided they are permitted by law. (*Compare* App. 5 at 9 for the District Court's concerns about non-availability of evidence and witnesses).

actions to federal courts (28 U.S.C. §1441(e)(4)),[7] and required mandatory intervention of all related claims into one action (under 28 U.S.C. §1369(d)).[8] These changes by Congress reveal 28 U.S.C. §1369 to be much more than 'simply' another jurisdictional 'act' as the courts below found. The right to intervene under §1369(d) extends even to those such as the Petitioners who could not successfully establish a claim as an original proceeding themselves, but who can intervene into a §1369 proceeding once established by others as the Crew did in the instant (". . . shall be permitted to intervene as a party plaintiff in the action, even if that person could not have brought an action in a district court as an original matter.") 28 U.S.C. §1369(d). *See Ms. Rigg, Ltd., LLC v. LaFayette*

[7] Congress amended 28 U.S.C. §1441 to include (e)(4), which provides that "An action removed under this subsection shall be deemed to be an action under section 1369 and an action in which jurisdiction is based on section 1369 of this title for purposes of this section and sections 1407, 1697, and 1785 of this title." Even though Congress may allowed FNC challenges to §1369 "actions", those challenges were required to apply to the entire "action" and not to a particular claim or claimant—but that is what happened below.

[8] Intervention is an ancillary proceeding to an existing lawsuit. *Noncommissioned Officers Assn. of the U.S. v. Army Times Publishing Co.*, 637 F.2d 372, 373 (5th Cir.1981), *mod. on other grounds and reinstated*, 650 F.2d 83 (5th Cir.1981). Once the District Court exercised jurisdiction over and determined venue for the principal action, venue in the ancillary proceeding properly rests upon the venue established by the principal action. *U.S. v. Acord*, 209 F.2d 709 (10th Cir. 1954) [*emphasis added*]; *Gore v. U.S.*, 171 F.Supp. 136 (D.C. Cir. 1959). Once the District Court accepted jurisdiction over the Crew Members §1369 action, ancillary jurisdiction and venue for the Passengers and anyone else injured due to the crash was established as well.

Ins. Co, 2007 WL 1300474 (E.D. La. 2007) (". . . the ultimate goal of MMTJA is consolidation".)[9] Congress intended for the MMTJA to consolidate all claims which arose from a catastrophic disaster into one proceeding.[10] *Wallace*, 444 F.3d at 702 (citing H.R. 106-276 at 7); *also see* 28 U.S.C. §1369(d). This consolidation presents logical sense as all claims arising from a single accident necessarily involve identical facts and identical issues of liability and causation due to the uniform acts or omissions of identical defendants. "There are significant advantages in having all the parties interested in apportioning a limited source of recovery assert their claims in one forum, not only to avoid inconsistent factual findings, but also to spare the litigants the additional costs of duplicate lawsuits." *Contact Lumber Co. v. P.T. Moges Shipping Co. Ltd.*, 918 F.2d 1446, 1452 (9th Cir. 1990). In this regard, the "Purpose and Summary" of H.R. 107-14 reveals a more expansive Congressional intent than the limited jurisdictional concept expressed by the Courts in their decisions below:

> H.R. 860 would allow a designated U.S. district court (a so-called "transferee" court) under the multidistrict litigation statute to retain jurisdiction over referred

[9] *See* 28 U.S.C. §1369; and Karnezis, Kristine, C., J.D., *Construction and Application of Multi-Party, Multi-Forum, Trial Jurisdiction Act of 2002 (MMTJA), 28 U.S.C. §1369*, 32 ALR Fed. 2d 263.

[10] "Current efforts to consolidate all state and Federal cases related to a common disaster are incomplete because current Federal statutes restrict the ways in which consolidation can occur—apparently without any intention to limit consolidation." H.R. 107-14 at 4.

> cases arising from the same fact scenario for purposes of determining liability and punitive damages. . . . The bill would save litigants time and money, but would not interfere with jury verdicts or compensation rates for attorneys [*Emphasis added.*]

Id. at 2. Additional language within the legislative history of the MMTJA also reflects that Congress did not intend to "simply" confer expanded jurisdiction on the District Courts, but that it also specifically intended to aggregate and consolidate all cases involving the same disaster into one proceeding, regardless of the legal nature of the claims advanced:

> Current efforts to consolidate all state and Federal cases related to a common disaster are incomplete because current Federal statutes restrict the ways in which consolidation can occur—apparently without any intention to limit consolidation. [*Emphasis added.*]

H.R. 107-14 at 4. *Accord Passa v. Derderian*, 308 F.Supp.2d 43, 53-54 (D.C. R.I. 2004) ("It is also clear that Congress' motivation in passing this legislation was to promote judicial efficiency while avoiding multiple lawsuits concerning the same subject matter strewn throughout the country in various state and federal courts.")

Once an action was brought under the MMTJA, the District Court was required to notify the Judicial Panel on Multi-District Litigation of the pendency of the action(s) so that all claims resulting from this crash would thereafter be consolidated for discovery and trial. 28 U.S.C.

§1369(e)[11]. The District Court never did so. When parties moved to consolidate the passenger and Crew claims into a unified Flight 708 proceeding, the District Court denied the request and treated the cases as distinct and unrelated by creating a separate proceeding for only the Crew. The District Court then dismissed the Passenger case for *forum non conveniens* on November 9, 2007. [App. 4, App. 5]. The Crew of Flight 708 later defeated the second of two *forum non conveniens* challenges on May 14, 2009 at which time they rooted a §1369 action that provided "anchor" jurisdiction in which to adjudicate all claims, including the claims of other victims of the same plane crash. [App. 3]. Not only did the Crew action open the District Court's door for their claims, but by operation of 28 U.S.C. §1369 they also opened the doors of the courthouse for everyone else who, like Petitioners, were killed in the same crash.[12]

[11] The District Court has stated that at all times it was exercising 28 U.S.C. §1369 jurisdiction below. [App. 1, App. 2].

[12] Neither does it matter under the MMTJA what claims one has, whether they are Montreal Convention claims, negligence claims, or even product liability claims, as under the MMTJA all that Congress required in order to consolidate or to intervene is for a Plaintiff to have been damaged as a result of the accident – something the Courts below never acknowledged or addressed. As such, the decision of the Circuit Court affirming the District Court for its analysis on page four of the Order [App. 5, App. 4] is clear error as the District Court segregated the Crew and Passengers based on the types of claims brought, i.e. product liability versus Montreal Convention claims, and then used same as a basis to dismiss the Passengers on FNC grounds. Under the MMTJA, Congress made no distinction as to the types of claims brought. 28 U.S.C. §1369(d) allows " . . . any

Consequently, Petitioners sought Rule 60(b) relief from the FNC dismissal of their Montreal Convention claims so that they could intervene their claims into the Flight 708 §1369 proceeding established by the Crew.

It was not until the District Court's May 13, 2009 Order denying FNC dismissal in the Crew Members action [App. 3] that Petitioners first learned that the District Court considered itself to be the most convenient forum to adjudicate a 28 U.S.C. §1369 proceeding for the instant airline disaster. Prior to the rendition of the May 13, 2009 Crew FNC Order, Petitioners were relegated to pursuing their Montreal Convention claims in Martinique. After May 13, 2009, the prior *forum non conveniens* dismissal was irrelevant as under the broad language of 28 U.S.C. §1369(d), it did not matter that the passengers could not establish a §1369 proceeding as an original matter. Once the Crew members successfully established anchor jurisdiction for a §1369 proceeding for the crash, the Passengers, at that instant, were entitled to intervene into the Crew action, regardless of their prior failure to establish a §1369 original action. *See* 28 U.S.C. §1369(d) ("shall be permitted to intervene as a party plaintiff in the action, even if that person could not have brought an action in a district court as an original matter.").

The refusal to grant Rule 60(b) relief not only thwarted Petitioners' attempts to join the Crew's

person with a *claim* arising from the accident . . ." to intervene. As such, it is impossible for the District Court to say that it was exercising §1369 jurisdiction at all times including when it dismissed the passengers for FNC and it is error for the Circuit Court to adopt same.

§1369 action and to bring their Montreal Convention claims in a unified proceeding, but it also undermined the Congressional mandate for intervention under the MMTJA in order that a unified proceeding occur. To deny Petitioners the opportunity to join the Crew frustrated Congress' desire for consolidation. *Rafoth, supra*; and *U.S. v. Canals-Jimenez*, 943 F.2d 1284 (11th Cir. 1991) (do not presume that Congress intended to enact meaningless legislation).

Petitioners met all of the requisites necessary for consolidation under §1369: their "claims" arose from the same "single accident" at the same "discrete location" as the Crew, and the Crew already established "anchor jurisdiction" for a §1369 action for those affected by Flight 708. Yet, they suffered a non merits *forum non conveniens* dismissal while the Crew did not. Section 1369(d) provided Petitioners a basis for 60(b) relief for intervention into the Crew's §1369 proceeding, after the Crew defeated its last FNC challenge, especially in light of the Congressional intent to include all affected by a qualifying accident in the same proceeding by its having used of the term "shall" when addressing intervention of additional party plaintiffs.[13] *DirecTV, Inc. v. Brown*, 371 F.3d 814, 817 (11th Cir. 2004) (recognizing Congressional intent between use of mandatory "shall" and permissive "may"); and *Legal Env. Assistance Found., Inc. v. U.S. EPA*, 118 F.3d 1467 (11th Cir. 1997) (absent an expression of legislative intent otherwise, the clear and mandatory language of the statute controls). To deny Petitioners relief and the commensurate right litigate their claims

[13] *See Passa*, 308 F. Supp. 3d at 53.

in the Crew's §1369 action in the District Court would frustrate Congress' intent behind the MMTJA jurisdiction established on May 13, 2009 by the Crew and would deny them their day in court. A Writ of Certiorari should issue for the representatives of 102 'Bapte' passengers killed aboard WCA Flight 708.

B. The Circuit Court's denial of Rule 60(b) Relief conflicted with decisions from this Court and from the Tenth Circuit Court of Appeals.

There was nothing equitable about segregating victims of the same aviation disaster into "Passengers" and "Crew" for the purposes of *forum non conveniens* analysis, while refusing the consolidation of all claims, or while denying Petitioners the relief required by the MMTJA. Petitioners are entitled to Rule 60(b) relief from the prior *forum non conveniens* dismissal of the their claims under "traditional principles of equity jurisprudence". *Safe Flight Instrument Corp. v. United Control Corp.*, 576 F.2d 1340, 1343 (9th Cir. 1978)(Decision in related case qualified as an "exceptional" circumstance warranting relief under Rule 60(b)) (citing *System Federation v. Wright*, 364 U.S. 642, 648 (1961); *also see U.S. v. Swift & Co.*, 286 U.S. 106, 115 (1932)). There was nothing equitable or fair in allowing the Crew of Flight 708 to litigate their claims in the District Court and pursue recovery based on domestic damage standards after having relegated the passengers who perished in the same crash to litigate their claims against a Florida based

carrier in Martinique, France so as to recover greatly reduced damages.[14] [App. 3].

"The general purpose of Rule 60(b) . . . is to strike a proper balance between the conflicting principles that litigation must be brought to an end and that justice must be done." *Coltec Ind., Inc. v. Hobgood*, 280 F.3d 262, 271 (3d Cir. 2002) (*quoting Boughner v. Sec'y of Health, Educ. & Welfare*, 572 F.2d 976, 977 (3d Cir.1978). As the mechanism for obtaining relief, Rule 60(b) ". . . should be liberally construed when substantial justice will be served." *Radack v. Norwegian Am. Line Agency, Inc.*, 318 F.2d 538 (2d Cir. 1963). Rule 60(b) relief has long been available to harmonize inconsistent decisions rendered in related cases arising out of the *same accident* in order to treat all affected claimants equally. *See e.g., Gondeck v. Pan Am. World Airways, Inc.*, 382 U.S. 25 (1965) (granting relief and reinstating the death benefits awarded to survivors after it was "apprised, however, of 'intervening circumstances of substantial effect' [*i.e.*, the appellate approval of death benefits to others involved in the same accident] justifying application of the established doctrine that 'the interest in finality of litigation must yield where the interests of justice would make unfair the strict application of our rules'" (quoting *U.S. v. Ohio Power Co.*, 353 U.S. 98, 99 (1957)); *Tsakonites v. Transpacific Carriers Corp.*,

[14] Both the District Court and the Eleventh Circuit clearly erred in concluding that the Crew and Passengers could be treated differently based on the types of claims brought when under the MMTJA Congress required no limitation on types of claims to be brought to the one consolidated proceeding. *See* 28 U.S.C. §1369(d).

322 F.Supp. 722 (S.D.N.Y. 1970) (granting relief from a dismissal for lack of jurisdiction under Rule 60(b)(5) and (6) after the United States Supreme Court considered a case presenting *similar jurisdictional facts* and involving the *same defendant* as the one sued by Mr. Tsakonites);[15] *Pierce v. Cook & Co.*, 518 F.2d 720 (10th Cir. 1975) (granting Rule 60(b)(6) relief because "the same vehicular accident has produced divergent results in federal and state courts"); and *Ritter v. Smith*, 811 F.2d 1398 (11th Cir. 1987) (discussing the importance of harmonizing the relief for litigants involved in related cases).[16] More recently, the United States Supreme Court in *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992) directed that relief under Rule 60(b) is properly granted when the request for relief is founded on ". . . either a significant change either in factual conditions or in law". *Accord Agostini v. Felton*, 521 U.S. 203 (1997) (granting Rule 60(b) relief based on subsequent change in the law).

The instant scenario calls out for equity under Rule 60(b)(5) and (6) as the continued application of the Passenger FNC dismissal Order is

[15] In discussing *Tsakonitis*, the Eleventh Circuit Court of Appeals recognized that, "Because of this ***close connection between the two cases***, the court found the circumstances sufficiently extraordinary to justify disturbing the finality of the judgment." *Ritter v. Smith*, 811 F.2d 1398, 1401 (11th Cir. 1987) [*emphasis added*].

[16] "The unusual combination of events which have occurred make the situation extraordinary. The federal courts in which plaintiffs were forced to litigate have given them **substantially different treatment than** that received in state court by **another injured in the same accident**." *Id.* [*Emphasis added.*]

preventing them from accessing the relief Congress intended when it passed the MMTJA. Further, the Eleventh Circuit's Order creates conflict with prior decisions of this Court in *Gondeck v. Pan Am. World Airways, Inc.*, 382 U.S. 25 (1965) and with a sister Circuit, *Pierce v. Cook & Co.*, 518 F.2d 720 (10th Cir. 1975).

In *Gondeck*, this Court determined that the only equitable means of affording victims of the same automobile accident equity was to grant petitioners Rule 60(b) relief so that they could recover damages commensurate with those recovered by the other victims of the same automobile accident. The Tenth Circuit Court of Appeals took the same approach in *Pierce*, when it relieved petitioners from the dismissal of their claims so that they could recover damages commensurate with those already obtained by victims of the same accident. In this case, Petitioners were denied access to the District Court to even seek the same relief by virtue of a *forum non conveniens* dismissal even though other victims of the same accident—the Crew—were permitted to litigate their claims. The Circuit Court's's refusal to grant Petitioners relief from the non-merits, *forum non conveniens* dismissal, conflicted with the *Gondeck* and *Pierce* decisions. By affirming the District Court's decision to relegate the MMTJA to "simply" a jurisdictional act, and by directing Petitioners to Martinique, France for recovery of greatly reduced damages while allowing the Crew that crashed the plan to proceed in the District Court, the Circuit Court ignored the Congressional intent behind the enactment of the MMTJA and the specific provisions of the MMTJA found at 28 U.S.C. §1369

such that Rule 60(b)(5) and (6) relief was warranted.

Accordingly, relief to Petitioners is in order, as the Eleventh Circuit's decision is contrary to the MMTJA, *Gondeck* and *Pierce*. A Writ of Certiorari should issue for the representatives of 102 'Bapte' passengers killed aboard WCA Flight 708.

CONCLUSION

Rule 60(b)(5) and (6) relief is available to do equity when circumstances arise which create inequity, injustice or unfairness. Given that Congress clearly provided that even those who could not maintain an original action under 28 U.S.C. §1369(d) could still intervene once an anchor jurisdiction for an MMTJA action was established, the Petitioners were still entitled to join the Crew Members' action under the statute. To deny the Petitioners the full relief afforded by the MMTJA amounted to a denial of their due process. The lower Courts' decisions which refused to grant Rule 60(b) relief, which avoided the specifics of the MMTJA and which disregarded the intent of Congress in passing the MMTJA demonstrate why Rule 60(b) relief was warranted and how the Eleventh Circuit's ruling conflicts with prior decisions of this Court and other Circuit Courts. In light of the foregoing, a Writ of Certiorari should issue for the representatives of the 102 'Bapte' passengers killed aboard WCA Flight 708.

Respectfully submitted,

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Dated: June 23, 2010

APPENDIX

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 09-15175
Non-Argument Calendar
Filed March 25, 2010

D.C. Docket No. 06-22748-CV-UU

SYLVIA BAPTE, Individually and as personal representative of the Estate of Christiane Bapte, deceased, STEPHANIE ISABELLE BAPTE, MARYVONNE BAPTE,

Plaintiffs-Appellants,

—versus—

WEST CARIBBEAN AIRWAYS, a Colombian corporation, NEWVAC CORPORATION, a Florida corporation, GO 2 GALAXY, INC., a Florida corporation,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida

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Before TJOFLAT, WILSON and COX,
Circuit Judges.

PER CURIAM:

In August 2005, while en route from Panama to Martinique, West Caribbean Airlines, S.A. Flight 708 crashed in Venezuela, killing all passengers and crew on board. Representatives of the passengers filed several lawsuits, which were consolidated in the United States District Court for the Southern District of Florida. They asserted wrongful death and strict liability claims against Defendants West Caribean Airlines, Newvac Corporation, Go 2 Galaxy, Inc., and Jacque Cimieter pursuant to 28 U.S.C. § 1369. In addition, representatives of the crew members brought products liability lawsuits against manufacturers of the airplane and negligence suits against Newvac in the same district court. The crew cases were consolidated with one another, but were not consolidated with the passenger cases.

In November 2007, the district court dismissed the passenger cases on *forum non conveniens* grounds, and the passengers' representatives appealed. We affirmed the district court's order dismissing the cases in *Pierre-Louis v. Newvac Corp.*, 584 F.3d 1052 (11th Cir. 2009). In May 2009, while the appeal of the dismissal was still pending, the district court denied a motion to dismiss the crew cases on *forum non conveniens* grounds. Believing that the denial of the motion to dismiss the crew cases changed the circumstances surrounding the prior dismissal of the passenger cases, the representatives of the passengers filed a motion for relief from judgment with the district court. *See* Fed. R. Civ. P. 60(b).

The district court issued an order on the Rule 60(b) motion while the appeal of its dismissal of the passenger cases was still pending. It held that due to the pendency of the appeal, it lacked jurisdiction to rule on the motion for relief from judgment. (R. 19-251 at 1.) Even so, the court addressed the merits of the motion and wrote "to advise the parties and the Eleventh Circuit Court of Appeals that if this Court had jurisdiction, it would deny the Motion." (*Id.*) The court explained that "[t]he Motion is based on no just or equitable reason which warrants relief" (*id.* at 2), and its order denying the motion to dismiss the crew cases on *forum non conveniens* grounds did not mean that the continued application of its order dismissing the passenger cases was no longer equitable. (*Id.* at 4.)

After review of the record, we conclude that the district court erred in holding it lacked jurisdiction to consider the motion. We have held that a district court retains jurisdiction to consider a Rule 60(b) motion for relief from judgment even after an appeal of the judgment from which relief is sought has been noticed. *See Parrott v. Wilson*, 707 F.2d 1262, 1266-67 n.8 (11th Cir. 1983) (citing *Lairsey v. Advance Abrasives Co.*, 542 F.2d 928, 930 (5th Cir. 1976); *Ferell v. Trailmobile, Inc.*, 223 F.2d 697, 698-99 (5th Cir. 1955)). Nevertheless, because the motion does not assert adequate grounds for relief from judgment, we conclude that the erroneous jurisdictional ruling was harmless, and we affirm the denial of relief.

The passengers' representatives argue that the denial of the motion to dismiss the crew cases created an automatic right, under 28 U.S.C. § 1369,

for the passengers to intervene in the crew cases. They argue that the denial established the Southern District of Florida as the appropriate forum for resolving any claim arising out of the crash of Flight 708 and constituted changed circumstances justifying relief under Rule 60(b)(5) and/or (6). We agree, however, with the district court's well-reasoned analysis on page four of its order explaining that 28 U.S.C. § 1369 merely provides the court with jurisdiction over all claims arising out of the disaster and that it exercised that jurisdiction when it applied the doctrine of *forum non conveniens* to dismiss the passenger cases. (R. 19-251 at 4.) We agree that its denial of a motion to dismiss the crew cases on *forum non conveniens* grounds did not make continued application of its dismissal of the passenger cases inequitable. (*Id.*)

The district court had jurisdiction to consider the Rule 60(b) motion, but the motion did not assert appropriate grounds for relief from judgment. Therefore, we vacate denial of the motion for want of jurisdiction, and amend the order to deny the motion on the merits. We affirm the order as amended.

ORDER AMENDED AND AFFIRMED.

A True Copy - Attested
Clerk U.S. Court of Appeals
Eleventh Circuit

By : /s/ [Illegible]
Deputy Clerk
Atlanta, Georgia

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 06-22748-CIV-UNGARO

IN RE: WEST CARIBBEAN AIRWAYS, *et al.*

ORDER ON MOTION FOR RULE 60(B) RELIEF

THIS CAUSE is before the Court on the "Bapte" Plaintiffs' Motion For Rule 60(b) Relief and Incorporated Memorandum of Law in Support (the "Motion") (D.E. 247) and Request for Oral Argument (D.E. 248), both filed on August 28, 2009.

THE COURT has considered the Motion and the pertinent portions of the record and is otherwise fully advised in the premises. The Motion seeks relief from this Court's Order Granting Defendants' Motion to Dismiss on Grounds of *Forum Non Conveniens*, entered on November 18, 2007 (the "FNC Order"). (D.E. 184.) In the FNC Order, the Court dismissed the actions of the passengers, including those of the "Bapte" Plaintiffs, against Defendants West Caribbean Airlines, S.A. ("West Caribbean"), Newvac Corporation ("Newvac"), and

Go 2 Galaxy, Inc. ("Go 2") under the Montreal Convention and directed the passengers to pursue their remedies in the French court in Martinique.[1]

The FNC Order to which the Motion is directed is on appeal and oral argument is scheduled for September 23, 2009. Due to the pendency of the appeal, this Court lacks jurisdiction to rule on the instant motion. Nonetheless, the Court writes to advise the parties and the Eleventh Circuit Court of Appeals that if this Court had jurisdiction, it would deny the Motion.

The Motion is based on no just or equitable reason which warrants relief. Rather, the Motion is merely part of strategy to subvert the FNC Order, indirectly influence the Eleventh Circuit Court of Appeals, and return to this Court at all costs, including the lost opportunity for speedier and more complete justice in the French court.[2] While

[1] This case arises of the August 16, 2005 crash of an airplane operated by West Caribbean, a Columbian airline. The crash occurred in Venezuela. Newvac chartered the aircraft for Go 2, a Martinican travel agency, for a series of round-trip flights between Martinique and Panama. The deceased passengers were mainly French citizens and residents of Martinique—none were United States domiciliaries.

[2] This strategy consists of three parts: first, petitioning the French court in Martinique to decline jurisdiction over the passengers' Montreal Convention claims (which effort was rejected by the French court on August 24, 2009); second the filing of a motion to intervene in the product-liability actions brought in this District by the representatives of the estates of the deceased crew members, notwithstanding that the "Bapte" Plaintiffs represented in their opposition to the motion to dismiss the passengers' cases on the grounds of *forum non conveniens* that resulted in the FNC Order that they would not pursue such claims; and

the Court of Appeals might ultimately view the FNC Order differently, this Court's view is that subsequent events have confirmed that the French court is the superior forum for the resolution of the passengers' Montreal Convention claims, such as were raised by the "Bapte" Plaintiffs. The French court is poised to make collectible damage awards for the passengers' wrongful deaths pursuant to French law. West Caribbean has conceded liability in the French court and waived the damages caps under the Montreal Convention; moreover, its insurer has agreed to pay the passengers' estates the full amount of the awards.[3] In contrast to the French court, this Court does not have personal jurisdiction over West Caribbean—the only defendant to the Montreal Convention claims with adequate assets and insurance coverage. And, liability for any additional product-liability claims, even if permitted, is purely speculative and surely distant in resolution.

In the Motion, the "Bapte" Plaintiffs argue that the Court's May 14, 2009 Order Denying the Defendants' Motions to Dismiss on the Grounds of *Forum Non Conveniens* in the companion, consolidated "Crew Member Case" (Case No. 07-22015-Civ-Ungaro, D.E. 321) now makes it apparent that there will be duplicate litigation arising out of the

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third, this Motion which argues that circumstances somehow have changed since entry of the FNC Order favoring litigation in this District by reason of the pendency of the product-liability claims of the representatives of the deceased crew members, despite the fact that such cases have been pending since August 2007.

[3] West Caribbean has approximately 450 million euros in coverage for the claims arising from the accident.

crash in both this Court and the French court in Martinique which could yield inconsistent results.[4] However, the passengers' Montreal Convention claims in the French court and the product-liability Crew Member Case in this Court are materially distinct and pose no danger of inconsistent results. With respect to liability; in Montreal Convention cases, the airline's fault is presumed; while in the product-liability cases, complicated issues of product defect and causation on the part of the aircraft's manufacturers, lessors, lessees, and owners must be resolved. In

[4] Actually, this Court, in the Crew Member Case, denied a *forum non conveniens* motion seeking a transfer to the French court on September 30, 2008, nearly a year ago; the motion was denied mainly because the Court was not persuaded that a French (European Union) court would have jurisdiction over the claims of the estates of the deceased Colombian crew members against U.S. corporations for an accident in Venezuela. The May 14, 2009 order in the Crew Member Case denied a *forum non conveniens* motions seeking a transfer to Columbia.

What really prompted the filing of this Rule 60(b) motion is that after this Court issued the FNC Order, the "Bapte" Plaintiffs sought to persuade the French court to decline to exercise jurisdiction over their Montreal Convention claims. The Court infers that the purpose of this exercise was to be able to argue to the Court of Appeals that the French court was not an alternative available forum for the Montreal Convention claims and that therefore the FNC Order should be reversed. This effort, however, came to a conclusion on August 24, 2009 when the French court ruled that it had jurisdiction and ordered the "Bapte" Plaintiffs to submit proof of their damages by October 23, 2009. This Rule 60(b) Motion followed four days later. The failed attempt in Martinique to frustrate this Court's duly entered order hardly qualifies as a just or equitable reason for relief under Rule 60(b).

fact, in the Montreal Convention cases pending in the French court, West Caribbean, over which this Court cannot assert jurisdiction, has appeared and both conceded liability and waived the damage caps. And under any theory of liability, the passengers' estates will be entitled to but one recovery for wrongful death and those damages will have to be assessed in accordance with the law of the place with the most significant relationship to the issue of damages. *See, e.g., Harris v. Berkowitz*, 433 So. 2d 613 (Fla. 3d DCA 1983). In the case of the "Bapte" Plaintiffs, for example, that assessment likely will be made under the law of their domicile regardless of forum location.[5] *See id.*

The "Bapte" Plaintiffs also argue that somehow the Court's May 13, 2009 order denying the motion to dismiss *on forum non conveniens* grounds in the Crew Member Case, triggered the application of 28 U.S.C. § 1369 by establishing the Southern District of Florida as the single forum for resolution of all claims arising out of the West Caribbean crash. However, the statute simply provides for this Court to have original jurisdiction over all claims arising from the disaster, and this Court has been exercising that jurisdiction since 2006. It was in the exercise of that jurisdiction that the Court determined that the doctrine of *forum non conveniens* warranted re-filing of the

[5] The undersigned concedes that, depending on the forum, the damages awards might or might not be made by a jury. But speculation that a jury award might be greater than a non-jury award is not a just or equitable reason warranting Rule 60(b) relief from the FNC Order.

wrongful death claims arising under the Montreal Convention in the French court in Martinique.[6]

Finally, the Court notes that, although not argued as a ground for Rule 60(b) relief, the "Bapte" Plaintiffs have moved to intervene in the consolidated Crew Member Case and therefore may contend that they should not be required to litigate in two fora. However, it is obvious that litigation in Martinique on the Montreal Convention claims will best serve the "Bapte" Plaintiffs' interests. Unlike in the Crew Member Case where liability is contested and not likely to be resolved for some time, the "Bapte" Plaintiffs and the estates of the other passengers will be able to obtain a prompt and possibly full recovery in the French court.

In sum, the "Bapte" Plaintiffs have failed to demonstrate that continued application of the FNC Order is no longer equitable or that any other of the reasons they cite justifies relief. In fact, the French court in Martinique clearly can provide speedier and more complete justice than possibly can be provided in this forum. Therefore, the FNC Order was and remains entirely in the "Bapte" Plaintiffs' interests and legally correct.

Accordingly, it is hereby

ORDERED AND ADJUDGED that the Motion For Rule 60(b) Relief and Incorporated Memorandum

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[6] That a federal court may have jurisdiction over an action does not moot the doctrine of *forum non conveniens*. In fact, only in limited circumstances may a court apply the doctrine before jurisdiction is established. *See Sinochem Intern. Co. Ltd. v. Malaysia Inter. Shipping Corp.*, 549 U.S. 422, 432 (2007).

of Law in Support (D.E. 247) is DENIED FOR LACK OF JURISDICTION. It is further

ORDERED AND ADJUDGED that the Request for Oral Argument (D.E. 248) is DENIED.

DONE AND ORDERED in Chambers at Miami, Florida, this 11th day of September, 2009.

/s/ URSULA UNGARO
URSULA UNGARO
UNITED STATES DISTRICT JUDGE

copies provided:
counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 07-22015-CIV-UNGARO

IN RE WEST CARIBBEAN CREW MEMBERS

ORDER DENYING DEFENDANTS' MOTIONS TO DISMISS ON THE GROUNDS OF *FORUM NON CONVENIENS*

THIS CAUSE is before the court on the following motions filed by Defendants: MK MK Aviation U.S.A. Inc.'s (MK Aviation) and MK Leasing's USA Ltd.'s (MK Leasing) Motions to Dismiss on the Grounds of *Forum Non Conveniens* (D.E. 160, 178); the Boeing Company's ("Boeing") Motion to Dismiss on the Grounds of *Forum Non Conveniens*, (D.E. 245); Honeywell International Inc.'s ("Honeywell") Motion to Dismiss on the Grounds of *Forum Non Conveniens* in favor of Colombia and joinder in The Boeing Company's and MK Leasing Inc.'s motions (D.E. 244); Pratt & Whitney Canada Corporation's, United Technologies Corporation's, and Pratt & Whitney Engine Services, Inc.'s Motion to Dismiss on the Grounds of

Forum Non Conveniens in favor of Colombia and joinder of Boeing's and MK Leasing's arguments in support of their respective motions to dismiss in favor of Colombia (D.E. 250); Defendants Newvac Corporation Inc. ("Newvac") and Continental Airlines Inc. ("Continental") and Pacific Harbor Capital Inc. ("PHC") adopted Boeing and Honeywell's motions to dismiss. (*See* D.E. 247, 249, 300.) The court shall refer to all Defendants as "Defendants." Plaintiffs filed one collective response to Defendants' motions. (D.E. 291.) Defendants filed replies to Plaintiffs' response. (*See* D.E. 294, 295, 296, 304.) The court has considered the motions and is otherwise fully informed in the premises.

BACKGROUND[1]

On August 16, 2005, an MD-82 aircraft designated West Caribbean Airways ("WCA") Flight 708, departed from Panama City, Panama for Fort de France, Martinique. While in flight, the aircraft lost speed and ultimately crashed in a swamp near Machiques, Venezuela. All passengers and crew members were killed. Plaintiffs are nine representatives of the eight deceased Colombian crew members who worked aboard the aircraft. All of the named Defendants are U.S. based corporations[2] who at some time prior to the crash were allegedly responsible for the maintenance,

[1] The facts recited herein are taken from the Consolidated Third Amended Complaint ("Am. Compl.").

[2] The place of incorporation of the Defendants is as follows; Boeing, Pratt Engine, Honeywell, and PHC are Delaware corporations (Am. Compl.¶¶ 1, 16, 20, 22); United Technologies is a Connecticut corporation (Am. Compl. ¶ 13);

repair and airworthiness of the aircraft and/or its engine parts.

Although the crash took place in a foreign territory, Plaintiffs' product liability claims primarily arise from the manufacture, maintenance and repair of the subject aircraft and its engine parts over a nineteen year period in the United States. The aircraft's chain of custody dates back to at least November 4, 1986, when Continental leased it as a commercial airliner pursuant to a series of agreements executed with Boeing and PHC. (Am. Compl. ¶ 32.) The lease, by its terms, was to expire on January 2005. (Am. Compl. ¶ 32.)

Continental operated the aircraft as a commercial airliner within the United States until 2001. (Am. Compl. ¶ 34, 35.) Between the years 1986 and 2001, more than 22 Service Difficulty Reports were issued regarding the subject aircraft. (Am. Compl. ¶ 36.) The Service Difficulty Reports addressed problems with, among other parts, the tail cone and right engine. (*Id.*) Additionally, the aircraft was equipped with JT8D Pratt & Whitney engines; the FAA has issued countless Airworthiness Directives relating to problems with the JT8D Pratt & Whitney engines in general, including, but not limited to, warnings as to bogus parts used in the JT8D engines out of Miami, Florida. (Am. Compl.¶ 37.) In October 2001, Continental retired the subject aircraft to the Mojave Desert in

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Pratt Canada is a Canadian Corporation (Am. Compl. ¶ 19); Continental and MK Aviation are Nevada corporations; (Am. Compl. ¶¶ 24, 28); Newvac is a Florida corporation (Am. Compl. ¶ 26.); and MK Leasing was a Texas Corporation (Am. Compl. ¶ 29). Plaintiffs allege that all the Defendants conducted business in Florida.

California where it remained for the balance of the lease and degenerated into a state of disrepair. (Am. Compl. ¶35.)

Between late 2004 and 2005, PHC made preparations to accept return of the subject aircraft from Continental in anticipation of the expiration of Continental's lease in 2005. (Am. Compl. ¶39.) Among other steps, in 2004, PHC contracted Aeronautical Systems, Inc., ("ASI"), an aircraft appraisal, brokerage and technical consultant located in Florida, to inspect the aircraft, its engines and technical documents. (Am. Compl. ¶42.) After the inspection, ASI was to provide PHC with return and re-marketing consultation services relating to the aircraft. (*Id.*)

Prior to returning the aircraft to PHC, Continental proposed to substitute the original engine in Position 2 with a replacement engine. (Am. Compl.¶43.) Upon inspecting the proposed replacement engine and comparing it to the original engine in Position 2, ASI concluded that the replacement engine had less value and a shorter life expectancy. (*Id.*) According to ASI's engine inspection report, the replacement engine had been assembled with spare parts from other used engines, which increased the problem of traceability for the replacement engine as compared to the original engine. (Am. Compl. ¶44.) Moreover, ASI concluded that the replacement engine had a heavy maintenance status that was considerably worse than that of the original engine. (*Id.*) Memoranda regarding these inspections were sent from ASI to Continental and carbon copied to PHC. All of the communications and transactions relating to the replacement of the original engine in Posi-

tion 2 of the aircraft took place in the United States, many originating in Ft. Lauderdale, Florida. (Am. Compl. ¶ 43.)

Based on its review of the engine, ASI requested that Continental and PHC provide other potential replacement engines for review. (Am. Compl. ¶ 45.) Despite this request, PHC did not cause another replacement engine to be considered, and Continental did not supply any alternative engines for consideration. (*Id.*) Plaintiffs allege that while cognizant that the replacement engine had suspicious replacement parts and a shorter life expectancy than the original engine in Position 2, Continental and PHC caused the original engine in Position 2 to be substituted with the replacement engine that had been assembled from used parts. (Am. Compl. ¶ 46.) Continental agreed to convey the replacement engine to PHC and Wilmington Trust Company (WTC), PHC's trustee at the time, in an agreement dated December 23, 2004. The transaction was allegedly rushed to conclusion in late 2004 so that PHC and WTC could convey the replacement engine to MK Aviation as an integrated component part of the subject aircraft in early 2005. (Am. Compl. ¶¶ 47, 48.) Continental delivered the replacement engine to PHC and WTC at Hobby Airfield in Houston, Texas.

On January 5, 2005, WTC and PHC sold the subject aircraft to MK Aviation, and on January 6, 2005 it was delivered by Continental to MK Aviation in Houston, Texas. (Am. Compl. ¶ 49.) At the time MK Aviation took possession, the aircraft had accumulated more than 48,000 hours and 23,000 cycles. (Am. Compl. ¶ 50.) The aircraft

remained in Houston for approximately seven additional months.

On March 15, 2005, Newvac, doing business in Florida as Go-2 Vacations, negotiated and executed a contract in Florida with WCA for use of an MD-8 aircraft. (Am. Compl. ¶56, 57, 65). Pursuant to the contract, Newvac contractually assumed all risks associated with air navigation for the entire aircraft for twenty-four specifically identified dates. (Am. Compl. ¶¶59-64.) On those dates, Newvac was to have sole and exclusive use of the entire aircraft and it was to select the routes, departure times and itineraries for the flights, while WCA was to supply the aircraft and crew. Due to operational and maintenance concerns relating to the proposed MD-8 aircraft, Newvac caused WCA to substitute the aircraft that later crashed for the MD-8 aircraft contemplated by the contract. (Am. Compl. ¶62.)

Pursuant to the contract, Newvac began sole and exclusive use of the aircraft on July 2, 2005. Newvac used the subject aircraft and the WCA crew on seventeen occasions. (Am. Compl. ¶¶66.) Newvac's last use occurred on August 16, 2005, the day of the crash. (Am. Compl. ¶¶67, 68.)

LEGAL STANDARD

The common law doctrine of *forum non conveniens* permits a court to dismiss a case over which it has jurisdiction, where factors of convenience and justice demonstrate that the matter should proceed in an alternative forum. A party moving to dismiss an action on the basis of *forum non conveniens* "must demonstrate that (1) an adequate

alternative forum is available, (2) the public and private factors weigh in favor of dismissal, and (3) the plaintiffs can reinstate their suit in the alternative forum without inconvenience or prejudice. . ." *Leon v. Million Air, Inc.*, 251 F.3d 1305 (11th Cir. 2001).

ALTERNATIVE FORUM

A defendant bears the burden of persuasion when invoking the doctrine of *foreign non conveniens* and moving to dismiss in favor of a foreign forum. *Camejo v. Ocean Drilling & Exploration*, 838 F.2d 1374, 1379-1380 (5th Cir. 1988). This burden of persuasion runs to all the elements of *forum non conveniens* analysis. (*Id.*) Therefore, the moving defendant must establish that an adequate and available forum exists as to all defendants if there are several. If the moving defendant carries this initial burden, it must also establish that private and public interests factors weigh heavily on the side of trial in the foreign forum. (*Id.*) The Supreme Court has held that a moving defendant need not submit overly detailed affidavits to carry its burden, but must provide enough information to enable the district court to balance the parties' interests. *Piper Aircraft Co. v. Reyno* 454 U.S. 235, 258 (1981).

For *forum non conveniens* purposes, forum availability and adequacy are separate considerations. With respect to adequacy the "alternative forum need not be perfect." *See Leon v. Million Air, Inc.*, 251 F.3d. 1305, 1311 (11th Cir. 2001). Nonetheless "[c]ourts have been strict about requiring that Defendants demonstrate that the alternative

forum offers at lease some relief." *Id.* Ordinarily, the court will find that an alternative forum exists if the defendant is "amenable to process" in the foreign jurisdiction. *Piper,* 454 U.S. at 262 n.22 (1981). However, where the remedy offered by the other forum is so unsatisfactory that it forecloses any remedy at all, this requirement may not be satisfied, the district court may conclude that dismissal would not be in the interests of justice. *Piper,* 454 U.S. at 254.

ANALYSIS

A. Availability of the Colombian Court

Defendants argue Colombian courts can exercise jurisdiction over the instant case on the grounds that (1) Article 23(2) of the Colombian Civil Procedure Code ("CCP") expressly authorizes jurisdiction in matters of this type; (2) the facts of the instant case have a clear connection to Colombia; (3) and Plaintiff's choice of forum is not entitled to deference as the crew members and their representatives are Colombian. *(See* D.E. 304 at 2-7.) Having carefully considered the parties' positions, the affidavits of their Colombian law experts, the applicable rules of jurisdiction contained in the CCP as well as other relevant provisions of Colombian law, and the underlying requirements of the *forum non conveniens* doctrine, the court finds Defendants have satisfied their burden of persuasion that Colombia affords an available alternative forum.

As an initial matter, the court agrees with both parties that Article 23 of the CCP and its sub-

paragraphs contain the basic rules governing jurisdiction in the Colombian courts. Most relevant to this case is Article 23(2) which states "If the defendant has no domicile, the judge of his residence is competent, and if the defendant does not reside in the country, the judge of the plaintiff's domicile is competent." *(See* D.E. 244-2.) The court further agrees with Defendants and their experts, Professors Luis Fernando Salazar-Lopez and Bernardo Salazar, that pursuant to the plain and literal terms of Article 23(2), Colombian courts of Plaintiffs' domiciles can exercise jurisdiction over the claims asserted in the present consolidated action given the fact that all the Plaintiffs are domiciled in Colombia and Defendants are not. Although Defendant's expert, Professor Reyes, contends that Article 23, taken as a whole, evinces a preference under Colombian law that corporations be sued in their place of domicile, the fact remains that Article 23(2) expressly addresses the situation where no defendant is domiciled or resident in Colombia and, in that event, plainly authorizes jurisdiction in the plaintiff's domicile. Similarly, Article 23(8) permits a Colombian court situated where a tortious act occurred to exercise jurisdiction, regardless of the domicile or residence of the defendant. Therefore, Article 23 clearly provides for exceptions to the general rule in Colombian law, if it exists, that corporations be sued where they are domiciled.

In reaching the conclusion that a Colombian court would take jurisdiction of this matter consistent with the literal language of Article 23(2), this court further finds persuasive Professor Salazar's opinion that there are at least two other

enactments in Colombia which suggest that the Defendants would be subject to liability in Colombian courts. The first is Article 78 of the Colombian Constitution which provides that one who "participates in the manufacturing and commercialization of good and services that affect the health or the security of consumers and users" is subject to liability under Colombian law; Article 78 apparently makes no distinction between foreign and domestic manufacturers and distributors. (Pls.' Resp., Ex. D ¶37.) The second is Decree 3466 of 1982 of the Colombian Consumer Statute (Decree 3466) which authorizes consumers and users to bring product liability claims against manufacturers, importers, and/or dealers for breach of warranty, breach of registered or announced quality standards, and for the payment of the damages caused by the defective products or services. (Pls.' Resp., Ex. D ¶38.) Salazar explains that the word "producer" under Decree 3466 means "every person, natural or legal entity, who produces, processes, transforms, or uses one or more goods with the purpose of obtaining one or more products or services addressed to the public consumption" and that the statute also makes no distinction between foreign and domestic "producers."

Plaintiffs' Colombian law expert, Professor Francisco Reyes recognizes, as he must, that in Colombia, a civil law country, the jurisdiction of the courts is established only by the Colombian Constitution, codes, statutes and treaties. Nonetheless, he urges this court to follow a Colombian Supreme Court of Justice ("SCJ") decision holding that the subject matter of a claim

must have a "relational connection" to Colombia in order for a Colombian court to exercise jurisdiction and that Plaintiffs' domicile, standing alone, does not satisfy that requirement. He also cites to scholars who have authored treatises who support that position. (Pls.' Resp., Ex. F ¶ 22.) Plaintiffs have failed to submit the SCJ case for the Court's review; thus, the Court accords little weight to Professor Reyes's description and interpretation of the SCJ decision. However, it appears to the undersigned that, in any event, there is a "relational" basis for jurisdiction under Colombian law consistent with the interpretations stated in the treatises to which Reyes cites. According to Professor Reyes, the relevant considerations to establish jurisdiction are "objective, subjective, functional, territorial and connection to the jurisdiction." (Pls.' Resp., Ex. F ¶ 22). These factors would appear to be present in this case given that Plaintiffs are domiciled in Colombia, the decedents were Colombian domiciliaries, Plaintiffs' damages accrued in Colombia, and WCA, a Colombian airline, supplied the allegedly defective aircraft.

The undersigned also is unpersuaded by Professor Reyes's opinion that Defendants' inability to cite any case law from Colombian courts indicating that Colombian nationals can initiate tort suits against foreign defendants for wrongful conduct occurring outside Colombia somehow shows that Colombia is not an available forum. Given the clarity of Article 23(2), the court finds more significant that Plaintiffs and their expert fail to produce any cases, articles or excerpts from treatises identifying instances where Colombian courts

have denied jurisdiction to their own citizens who have suffered damages as a result of extra-territorial wrongful conduct.

Lastly, the court notes its disagreement with Plaintiffs that they have an absolute right to select the forum, whether foreign or domestic, under Colombian law. While that may be the law in Colombia, that is not the law in the United States where this action is currently pending. And Plaintiffs have submitted no authority suggesting that the Colombian courts would decline to exercise jurisdiction over this case on the ground that it was initiated by Plaintiffs in the United States. The Supreme Court case on which Plaintiffs rely to make this argument also was not supplied, but appears simply to hold that a Colombian court will not disturb the Plaintiffs' choice of another Colombian forum. More to the point, Defendants' have provided at least one illustration of a case dismissed by an American court on the grounds of *forum non conveniens* and then re-filed and litigated in Colombia. (*See* D.E. 304, Ex. B.)

C. Adequacy of the Forum

An alternative forum is "presumed" adequate unless the plaintiff makes some showing to the contrary." *Leon*, 251 F.3d. at 1312. "An adequate forum need not be a perfect forum." *Satz v. McDonnell Douglas Corp.* 244 F.3d 1279, 1283 (11th Cir. 2001.) However, "where the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate alternative. . ." *Piper Aircraft*, 454 U. S. at 255 n. 22. Plaintiffs argue that the lack of safety and security for witnesses and lawyers in Colombia

makes the Colombia court an unsafe and inadequate alternative forum. (Pls.' Resp. 7.) Plaintiffs submit Exhibit M, a French Report, indicating that on one occasion, a Colombian paramilitary group intimidated witnesses and Colombian Judges in an effort to frustrate their testimony or investigation into the subject accident. (Pls.' Ex. M.) Plaintiffs also submit documents from the U.S. State Department and other human rights reports that generally warn U.S. citizens of the dangers of traveling to Colombia. (Pls.' Exs. N, O, P, Q, R.) The court has reviewed Plaintiffs' exhibits, and is not persuaded that the safety concerns the documents identify establish that the Colombia court is so unsatisfactory that it forecloses any remedy. Although imperfect, the court finds Colombia to be an available and adequate forum in which Plaintiffs can pursue their claims. *Satz*, 244 F.3d. at 1283.

Since Defendants have established the availability and adequacy of an alternative forum, the court must now determine whether private and public interests factors weigh in favor of dismissal on grounds of *forum non conveniens*.

D. Private and Public Interests Factors

i. *Plaintiffs' choice of forum*

"There is ordinarily a strong presumption in favor of the plaintiffs' choice of forum, which may be overcome only when the private and public interest factors clearly point towards trial in the alternative forum." *Piper Aircraft*, 454 U.S. at 255. However, the presumption applies with less force when the plaintiffs are foreign. *La Seguri-*

dad v. Transytur Line, 707 F.2d 1304, 1307 (11th Cir. 1983). Here, all nine Plaintiffs are Colombian citizens. Thus, the court must apply a weaker presumption and less deference towards Plaintiffs' choice of forum. Nevertheless, "less deference" to their choice of forum does not mean "no deference." The burden remains with the Defendants to establish that the private and public interest factors heavily weigh in favor of dismissal.[3]

ii. *Private Interests Factors*

> The Court's consideration of private interest factors include the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of the premises, if view would be appropriate to the action; and all other

[3] Despite the fact that Plaintiffs herein are foreign, Plaintiffs also argue that they should receive the full benefit of the presumption in favor of their chosen forum because Colombia and the United States have a treaty guaranteeing Colombian citizens access to the United States courts equal to that of United States citizens. (Pls.' Resp. 10-11.) Notably, Plaintiffs did not supply the treaty. Moreover, this court has previously held that these friendship treaties apply to legal actions involving citizens of one signatory who are "transient or dwelling" in the territory of the other signatory *Da Rocha v. Bell Helicopter Textron, Inc.*, 451 F. Supp.2d 1318, 1323 (S.D. Fla. 2006). Similarly, the Court finds here that the Plaintiffs do not meet this criterion. Thus, the treaty does not require that Plaintiffs' choice of forum be given substantial deference. However, even given this consideration, the Court finds that the private and public interest factors weigh in favor of maintaining the action in the United States.

> practical problems that make trial of a case easy, expeditious and inexpensive.

Piper Aircraft, 454 U.S. at 241 n. 6.

Defendants argue that the following private interest factors weigh in favor of dismissal; (1) WCA's absence from the present action; (2) litigating in Colombia would provide greater access to evidence; (3) the fact that this court cannot compel liability evidence or third party damages evidence; (4) litigating the crew member claims in the United States would cause Defendants to defend litigation arising out of the same accident simultaneously in multiple forums, (5) the existence of ongoing Colombian litigation; (6) all relevant documents and witnesses within Defendant's control would be made available by Defendants in Colombia. (*See* D.E. 245 at 10-16.)

The court begins its consideration of the private interest factors by noting that, in sum and substance, the Amended Complaint asserts product liability claims relating to the construction and maintenance of the subject aircraft and its engines, as well as negligence claims (failure to warn) relating to the aircraft's condition of disrepair while it was in Defendants' custody and control in the United States. The companies that owned, operated and maintained the aircraft and supplied its engine parts for at least nineteen years prior to the accident are located in the United States. Indeed, it appears the subject aircraft was in use overseas for only about one month prior to the crash. Additionally, the accident occurred not in Colombia, but in Venezuela. Thus, while some relevant liability evidence may be in the possession of WCA and other third parties in

Colombia and other important liability evidence may be in Venezuela, the majority of the evidence pertaining to the construction, maintenance, and repair of the subject aircraft and its engine parts is most likely located in the United States.

While this imbalance is addressed to a degree by Defendants' willingness to make their current employees available to testify in Colombia, Defendants cannot ensure that all of the critical liability evidence is in its possession or control given the lengthy history associated with the aircraft. For example, there surely will be former employees with knowledge of the construction and maintenance of the aircraft and the engine parts, and employees of other entities, such as ASI, which were involved with the aircraft over whom Defendants will have no control. Accordingly, Plaintiffs are far more likely to be able to secure the appearance of all relevant liability witnesses if the case is heard in a United States court.

As for documents, Defendants represent that they will make whatever documents are in their possession or control available in Columbia. However, Defendants concede that all of the manufacturing specifications, other technical documents and the maintenance records are in English and this court only can presume that they are voluminous. While Defendants seek to minimize this problem by suggesting that only a small portion would have to be translated in order to support expert affidavits, it seems more likely to the undersigned that a Colombian court would require that all documents with evidentiary value be translated into Spanish. The translation of these types of documents can be unreliable and contro-

versial. Also, the translation would cause substantial delay and be exceedingly expensive. Additionally, there likely are documents in the possession of third parties, such as ASI, that could be critical to the Plaintiffs' case that could be difficult for Plaintiffs to obtain if this matter were litigated in Colombia and which Plaintiff would need to translate for presentation to a Colombian court.

Defendants make much of the fact that some liability evidence will be located in Colombia, such as WCA's records and witnesses regarding the aircraft. However, given that the aircraft was only in WCA's possession for about one month prior to the crash and that it appears that WCA's crews may have been trained locally, such evidence is bound to be scant in comparison to the volume of records generated during the nineteen years that the aircraft was residing in the United States. Therefore, to the extent such evidence is located in Colombia, the burden on Defendants from having to employ letters rogatory to obtain it will be less than if Plaintiffs are required to rely on such devices to obtain critical liability evidence from the United States for presentation in a Colombian court. In this regard, the court concedes that letters rogatory are expensive and inefficient; but it appears that in this case they are unavoidable; there simply is no perfect forum since the accident occurred in Venezuela, the aircraft was manufactured and maintained for most of its history in the United States, the crew was Colombian and the flight was chartered out of Florida.

As for damages evidence, family members, heirs and survivors of the crew members, WCA employ-

ment records, Plaintiffs' medical records and other records relating to claims for economic losses are most likely located in Colombia. However, much of this evidence is in Plaintiffs' control and, because Plaintiffs have the greater interest in pursuing the case to conclusion, the court anticipates that Plaintiffs will voluntarily produce much of the damages evidence in the United States. The balance presumably can be obtained through letters rogatory. In any event, due to the breadth of Plaintiffs' product liability and negligence claims, the availability of liability witnesses and documents in the United States outweighs the lack of availability in the United States of some liability and damages evidence that will have to be accessed from Colombia.

Finally, the court is not persuaded by Defendants' argument that the absence of WCA would prejudice their defense at trial or cause incomplete or fragmented adjudication of the present case. As Plaintiffs' point out, Florida law permits Defendants, as an affirmative defense, to attribute tort liability to a party who is absent from the litigation. *See Fabre v. Marin*, 623 So.2d 1182, 1185 (Fla. 1993); *See* Fla. Stat. § 768.81. Due to the availability of this affirmative defense, Defendants actually may enjoy an advantage from WCA's absence during a jury's determination of liability. Moreover, if Colombia is an available and adequate forum, as Defendants contend, it is plausible that at the close of the litigation, Defendants, if found liable, could pursue contribution from WCA in Colombia. As to the two Plaintiffs' civil actions in Colombia against the Special Administrative Unit of Civil Aeronautics of

Colombia, the disposition of these actions is disputed, and the court is unable to conclude from their existence that litigation of this case in the United States would cause fragmented or duplicative litigation or pose a risk of inconsistent adjudications, particularly since it does not appear that any of the Defendants herein have been named as parties in those lawsuits.

In sum, after carefully considering the arguments of the parties, the court finds that the private interests factors do not weigh in favor of dismissal. The undersigned concludes that if Plaintiffs' claims against Defendants are permitted to proceed in this court, the parties, by and large, will have greater access to important witnesses and documents and the procurement and presentation of relevant evidence will be less costly and more efficient.

iii. *Public Interest Factors*

The public interests factors to be considered include:

> The administrative difficulties flowing from court congestion; the local interest in having localized controversies decided at home; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; the avoidance of unnecessary problems in conflict of laws; or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty.

Piper Aircraft, 454 U.S. at 241 n.6

With respect to the public interest factors, Defendants argue only that Colombia has a greater interest in the litigation to that of Florida or the United States as a whole, that litigation in this court would impose an undue administrative burden, and that dismissal of the action on *forum non conveniens* grounds would avoid unnecessary conflict of law problems. (*See* D.E. 296 at 9-10.) Accordingly, the court will only address these three factors.

First, although Colombia has a strong interest in adjudicating this lawsuit because it involves injuries to its citizens, the United States generally has a strong interest in assuring that United States manufacturers and airlines do not produce defective products or engage in conduct that endangers users wherever located. Additionally, the United States has a direct and specific interest in this particular case since the allegedly defective aircraft was used to charter U.S. residents for nearly nineteen years; on the other hand, WCA only had control of the aircraft for one month and, even then, it was used to ferry passengers between locations outside of Colombia.[4] Therefore, the court finds that the United States has a substantial interest in the outcome of this litigation that is not heavily outweighed by

[4] This court also agrees with Plaintiffs that Florida has a significant interest in the case being litigated in this district since it appears that Newvac arranged the charter from Florida, Newvac purchased replacement parts for the aircraft for WCA from Florida companies, ASI, which is based in Ft. Lauderdale, inspected and evaluated the aircraft at the end of Continental's lease, and WCA may have trained its pilots in Florida.

Colombia's interest. Accordingly, the Court finds this public interest factor does not weigh in favor of dismissal.

Next, the Defendants have not demonstrated that the administrative burden posed by this case would be excessive. This case is not like *Nolan v. Boeing Co.*, 762 F. Supp. 680 (E.D. La. 1989) which involved more than 100 plaintiffs. Instead, this case involves eight wrongful death claims against U.S. domiciled defendants and concerns an aircraft which was resident in the United States for nineteen years prior to the crash. While the litigation of these claims undoubtedly will be complex, Defendants have failed to make a persuasive case that the complexities will exceed other large, complex product liability cases that have been tried to conclusion in this district.

Finally, with respect to the interest in the avoidance of conflict of laws issues, the Eleventh Circuit has held that "[w]hile the application of foreign law is an important factor to be considered in weighing the public interests factors, this factor cannot be accorded dispositive weight." *Sme Racks, Inc. v. Sistemas Mecanicos Para Electornic, SA*. 382 F.2d 1097, 1104 (11th Cir. 2004.) In any event, it is unclear at this juncture whether there will be any actual conflict between Colombian law and United States law on the issues of liability and damages necessitating a choice of law analysis. With respect to the capacity of the Plaintiffs to pursue claims on behalf of decedents, there likely will be a need to apply foreign law; but this court is frequently called upon to make such determinations in international air crash cases.

Accordingly, the public interest factors identified by Defendants do not weigh in favor of dismissal of this case to Colombia.

Based on the foregoing, it is hereby,

ORDERED AND ADJUDGED, Defendant's Motion to Dismiss Plaintiffs' Third Amended Complaint pursuant to the doctrine of *forum non conveniens* is DENIED.

DONE AND ORDERED in Chambers at Miami, Florida, this 13 day of May 2009.

/s/ Ursula Ungaro
URSULA UNGARO
UNITED STATES DISTRICT JUDGE

Copies provided:
counsel of record

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No.: 06-22748-UNGARO

IN RE: WEST CARIBBEAN AIRWAYS, S.A.,
a Colombian corporation, et al.

ORDER TO CLARIFY ORDER OF DISMISSAL

THIS CAUSE is before the Court upon Plaintiffs' Motion To Clarify this Court's Order Granting Defendants' Motion to Dismiss for *Forum non Conveniens* to clarify the imposition of conditions on the parties that are contemplated prerequisites to this Court's dismissal of the above action on the grounds of *forum non conveniens*. (D.E. 184)

THE COURT has considered the motion, and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that Defendants' Motion (D.E. 159) is GRANTED, subject to the following conditions. The Defendants must 1) submit to the jurisdiction of, and accept service of process from, the courts of Martinique; 2) waive any statute of limitations arguments respecting the

refiling of the actions in Martinique, (D.E. 184); and 3) agree that damages sought are governed by Article 21(1) of the Montreal Convention, and that they will not resort to the defenses provided for in Article 21(2);

The parties have stipulated that the concessions of the Defendants are binding and shall be considered a condition of the Order of Dismissal provided that the Plaintiffs' in these consolidated actions, or the beneficiaries on whose behalf they are brought, recommence their actions in Martinique, France within six (6) months of the date of this order. Moreover within fourteen (14) days of this Order, Plaintiffs shall file and serve upon opposing counsel a complete list of all the beneficiaries whom they represent in these consolidated matters, unless such names have previously been specifically and fully incorporated in the Amended Complaint(s) filed herein.

DONE AND ORDERED in Miami, Florida, this 7 day of December, 2007.

/s/ Ursula Ungaro
URSULA UNGARO
UNITED STATES DISTRICT JUDGE

Copies provided
cc:Counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 06-22748-CIV-UNGARO
(Filed Nov. 13, 2007)

IN RE: WEST CARIBBEAN AIRWAYS, S.A., *et al.*,

Defendants.

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS ON GROUNDS OF FOR [sic] FORUM NON CONVENIENS

THIS CAUSE is before the Court upon Defendants' Motion to Dismiss on Grounds of *Forum Non Conveniens*. D.E. 159. The Court has considered the Motion and is otherwise fully advised in the premises.

a. Facts

These consolidated actions arise out of the August 16, 2005 airplane crash in Venezuela of West Caribbean Airways flight 708, while en route from Panama to Martinique. Plaintiffs are, and the decedents were, residents of Martinique, a

Department of the Republic of France. *See* D.E. 152 (Am. Compl.) at ¶¶ 7, 74.[1] Defendant West Caribbean Airways, S.A. is a Colombian corporation with offices in Medellin, Colombia. *Id.* at ¶ 9. Defendants Newvac Corporation and Go 2 Galaxy, Inc. are Florida corporations. *Id.* at ¶ 15.[2]

On March 15, 2005, Newvac entered into a "charter contract" with West Caribbean Airways in Medellin, Colombia, pursuant to which West Caribbean was to provide a 152-passenger MD-81 aircraft and crew, for charter flights occurring during May, July and August 2005. *See* D.E. 99 (McCune Decl.), Ex. "5" (English translation of Charter Contract, originally in Spanish, executed by Jacques Cimetier on behalf of Newvac, d/b/a Go-2 Vacations). Thereafter, on April 25, 2005, Newvac entered into a "contract for air chartering" with Globe Trotter Agency, a travel agency in

[1] It is undisputed that all but one of the decedent passengers were French nationals. *See* D.E. 159 (Mot.) at 2. This one decedent was an Italian national residing in Martinique. *Id.* n. 3.

[2] The Galbert Plaintiffs sued an additional Defendant, Aseguradora Colseguros, S.A., a Colombian corporation alleged to be the liability insurer of the aircraft at issue. *See* D.E. 152 (Am. Compl.) at ¶ 16. On March 7, 2007, Plaintiffs moved for a 120 day extension of time within which to serve Aseguradora Colseguros. *See* D.E. 38 (Mot.). The Court granted Plaintiffs' Motion. *See* D.E. 51 (Order). The 120-day extension of time expired on or about July 6, 2007, and Plaintiffs neither moved to extend the deadline nor filed proof of service on this Defendant. *See* Fed. R. Civ. P. 4(1). Therefore, the Court dismisses Aseguradora Colseguros without prejudice due to Plaintiffs' failure to effect service of process within the time allotted by the Court's Order. *See* Fed. R. Civ. P. 41(b).

Martinique, whereby Newvac agreed to provide the aircraft it chartered from West Caribbean to Globe Trotter for a series of excursions between Martinique and Panama. *See* D.E. 99 (McCune Decl.), Ex. "7" (English translation of Charter Contract, originally in French, executed by Jacques Cimetier on behalf of Newvac, d/b/a Go-2 Vacations). Newvac also provided Globe Trotter with the hotel, transportation and "sightseeing" for these excursions. *See* D.E. 145 (Cimetier Depo.) at 185:6186:4. One hundred fifty two (152) passengers and eight (8) crew members were killed while on one of the excursions sold by Globe Trotter when West Caribbean's aircraft crashed over Venezuela on a return trip from Panama. *See* D.E. 152 (Am. Compl.) at ¶¶ 31-33, 41, 52, 66, 75.[3]

Plaintiffs bring this action pursuant to the Montreal Convention. *Id.* at ¶ 3.[4] Where applicable, the Convention exclusively governs the rights and liabilities of passengers and carriers in international air transportation.[5] On September 26, 2007, the Court issued its Preliminary Order on Defen-

[3] *See* Brian Ellsworth, *Airline Crash in Venezuela Kills 160* (visited October 31, 2007) <http://www.npr.org/templates/story/story.php?storyId=4802464>.

[4] The Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999 (entered into force on Nov. 4, 2003), *reprinted in* S. Treaty Doc. No. 106-45, 1999 WL 33292734 (hereinafter "Montreal Convention").

[5] *See El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 161, 174 76 (1999) (addressing the Warsaw Convention, predecessor of the Montreal Convention); *Kruger v. United Airlines, Inc.*, 481 F. Supp. 2d 1005, 1008 (N.D. Cal. 2007); *Onwuteaka v. Northwest Airlines, Inc.*, No. H-07-0363, 2007 WL 1406419, *1 (S.D. Tex. May 10, 2007).

dants' Motion to Dismiss on Grounds of Forum Non Conveniens. D.E. 165. The Court found that Defendant "Newvac is a 'contracting carrier' pursuant to Article 39 of the Montreal Convention and that the doctrine of *forum non conveniens is* applicable in this proceeding pursuant to Article 33(4) of the Montreal Convention." *Id.* at 49. After allowing the parties to fully brief the issue (*id.*), the Court now proceeds to determine whether the actions should be dismissed on *forum non conveniens* grounds.

b. *Forum Non Conveniens*

A party moving to dismiss an action on the basis of *forum non conveniens* "must demonstrate that (1) an adequate alternative forum is available, (2) the public and private factors weigh in favor of dismissal, and (3) the plaintiff can reinstate his suit in the alternative forum without undue inconvenience or prejudice. . . ." *Leon v. Million Air, Inc.*, 251 F.3d 1305, 1311 (11th Cir. 2001) (internal citations and quotation marks omitted). With respect to the second prong of the analysis, "balancing private interests requires determining the convenience of the parties, affording domestic plaintiffs a strong presumption that their forum choice is sufficiently convenient, and a weaker presumption applying in cases brought by foreign plaintiffs." *Id.* Further, although private interest factors are generally considered more important than public interest factors, a court should consider both in its analysis. *Id.*

c. Plaintiffs' Argument

It should be obvious from the facts outlined above that the actions now pending before the Court present a strong case for *forum non conveniens* dismissal. The substance of Plaintiffs' argument in opposition is that the actions should not be dismissed given Defendants' likely assertion of third-party claims for contribution against, *inter alia*, U.S.-based manufacturers. *See, e.g.*, D.E. 170 (Pls.' Resp.) at 1-3, 6, 10-12.[6] According to Plaintiffs, the addition of these claims will require significant litigation regarding the apportionment of liability. *Id.* Thus, Plaintiffs suggest superimposing the *forum non conveniens* analysis respecting the potential third-party claims over the *forum non conveniens* analysis applicable to the claims which actually are at issue herein. *Id.* The Court is not persuaded.

Plaintiffs have not cited, and the Court has not found, cases wherein courts have followed the analytical approach Plaintiffs propose. Plaintiffs cite *Piper Aircraft v. Reyno*, 454 U.S. 235, 259 (1981),

[6] Article 37 of the Montreal Convention provides: "Nothing in this Convention shall prejudice the question whether a person liable for damage in accordance with its provisions has a right of recourse against any other person." Defendants submit that Plaintiffs' argument is extraneous to the issues before the Court and that therefore, they should not have to concede that they will not pursue third-party claims. *See* D.E. 170 (Pls.' Resp.) at 3 n. 2. Nevertheless, Defendants represent that Defendant West Caribbean bears full financial responsibility to the passengers, as it was the actual carrier. *Id.*; D.E. 180 (West Caribbean's Reply) at 2-3. Thus, West Caribbean represents that it does not intend to assert any third-party claims in Martinique. *Id.*

where, in discussing the private interest factors, the Supreme Court noted that the district court had "correctly concluded that the problems posed by the inability to implead potential third-party defendants clearly supported holding the trial in Scotland." *Id.*[7] The Supreme Court observed that:

> Joinder of the pilot's estate, [the aircraft's owner], and [the aircraft's operator] is crucial to the presentation of [the manufacturers'] defense. If [the manufacturers] can show that the accident was caused not by a design defect, but rather by the negligence of the pilot, the plane's owners, or the charter company, they will be relieved of all liability. It is true, of course, that if [the manufacturers] were found liable after a trial in the United States, they could institute an action for indemnity or contribution against these parties in Scot-

[7] The district court had determined that it would be unfair to make the defendants, U.S. manufacturers of aircraft parts, proceed to trial in the U.S. "because crucial witnesses and evidence [of the aircraft crash] were [in Scotland] beyond the reach of compulsory process, and because the defendants would not be able to implead potential Scottish third-party defendants." *Id.* at 242 (citing *Reyno v. Piper Aircraft Co.*, 479 F. Supp. 727, 733 (M.D. Pa. 1979)). The district court recognized that even if the trial was held in the United States, the manufacturers could thereafter file indemnity or contribution actions against the Scottish defendants in Scotland. *Id.* at 243 (citing *Reyno*, 479 F. Supp. at 733). However, the district court found that there was a significant risk of inconsistent verdicts based on the differing standards of liability applicable in the U.S. and Scotland, and the danger that different juries would find different facts and produce inconsistent results. *Id.* n. 7.

> land. It would be far more convenient, however, to resolve all claims in one trial.

Id. (internal citation omitted).

The foregoing language supports consideration, as part of the private interest factors, of a defendant's argument that a plaintiff 's chosen forum would preclude the defendant from impleading other alleged tortfeasors.[8] In this case, however, it is Defendants who propose Martinique as an alternative forum. They have no doubt considered the advantages and disadvantages of defending themselves therein. Significantly, there is no argument that the U.S.-based entities Plaintiffs refer to cannot be impled [sic] in Martinique.[9] Moreover, Plaintiffs do not persuasively argue that *their* actions will be prejudiced if Defendants elect to file third-party claims in Martinique.[10] Therefore,

[8] It is also more convenient to resolve all claims in a single proceeding (*id.*), which avoids the potential for inconsistent results. *Id.* at 243.

[9] Indeed, the "Bapte" Plaintiffs acknowledge filing suit against these entities in Martinique, albeit as an alleged protective measure because Defendant West Caribbean allegedly evaded service of process in this action. *See* D.E. 170 (Pls.' Resp.) at 20.

[10] Plaintiffs cursorily submit that if the actions are tried in Martinique they will litigate claims against the U.S. manufacturers under U.S. law, while if the actions remain here, they will not. *See* D.E. 170 (Pls.' Resp.) at 5. This argument, purportedly based on the Hague Convention on the Law Applicable to Products Liability, is devoid of any details that would allow the Court to weigh its validity and significance, if any. *Id.* The Court finds Plaintiffs' contention wholly unpersuasive where they have not sued the manu-

the Court will consider the potential thirdparty claims in the context of the private and public interest factors, as such consideration does not alter the Court's ultimate determination. The Court notes, however, that in the instant cases Plaintiffs' arguments concerning the Defendants' ability to implead third parties do not carry the same weight as when a defendant claims prejudice from its inability to implead potential tortfeasors. *See, e.g., Kilvert v. Tambrands Inc.*, 906 F. Supp. 790, 795-96 (S.D.N.Y. 1995); *Morse v. Sun Intern. Hotels, Ltd.*, No. 98-7451Civ, 2001 WL 34874967, *4 (S.D. Fla. Feb. 26, 2001).

d. Alternative Forum

The moving party must demonstrate the availability *and* adequacy of an alternative forum. *See Leon*, 251 F.3d at 1311. Generally, an alternative forum is available if the moving party shows that it is amenable to process in that forum or if it consents to the jurisdiction of the alternative forum. *Id.; Reyno*, 454 U.S. at 242, 254 n.22; *Satz v. McDonnell Douglas Corp.*, 244 F.3d 1279, 1282-83 (11th Cir. 2001); *Magnin v. Teledyne Continental Motors*, 91 F.3d 1424, 1429 (11th Cir. 1996). In this case Defendants stipulate that if the Motion is granted, they will submit to the jurisdiction of, and accept service of process from, the courts of Martinique. *See* D.E. 159 (Motion) at 2, 12, 25; D.E. (168) (Resp. to Court Order). Thus, the Court finds that Martinique is an available forum.

facturers in this forum and offer no explanation why dismissing the actions to Martinique would suddenly compel them to pursue those actions therein.

With respect to "adequacy," the alternative forum need not perfect. *See Leon*, 251 F.3d at 1311. "Courts have been strict about requiring that defendants demonstrate that the alternative forum offers at least some relief." *Id.* Defendants have submitted the declaration of French attorney Maylis Casati-Ollier, who has practiced in the area of aviation law for more than 30 years. *See* D.E. 162 (Casati-Ollier Decl.) at ¶¶ 1, 5. Ms. Casati-Ollier advises that in the French judicial system, a "*Tribunal de Grande Instance*" ("*TGI*") has exclusive jurisdiction over actions arising under the Montreal Convention. *See* D.E. 162 (CasatiOllier Decl.) at ¶¶ 6-8. There is a TGI in Fort-deFrance, Martinique, and pursuant to Article 33 of the Montreal Convention, it may entertain Plaintiffs' actions and award damages. *Id.* at ¶¶ 8, 17, 19-21. Thus, the Court has no reason to doubt that Martinique is an adequate forum. In fact, Plaintiffs do not dispute this element of the *forum non conveniens* analysis.

Nevertheless, the Court addresses Plaintiffs' suggestion, in their discussion of the public interest factors, that the actions would proceed inefficiently in Martinique because there is only one four-chamber court therein. *See* D.E. 170 (Pls.' Resp.) at 22.[11] These intimations are insufficient to raise an issue as to the adequacy of a forum. Where inefficiency is alleged "defendants have the ultimate burden of persuasion, but *only* where the

[11] The TGI in Martinique is "composed of four 'sections', each of the first three integrated by three magistrates and the fourth composed by a single Judge." *See* D.E. 171 (Belleeave Decl.) at ¶ 16.

plaintiff has *substantiated his allegations of serious . . . delay.*" *Id.* at 1312 (emphasis added).[12] Plaintiffs' allegations fail to substantiate an argument of inadequacy based on the inefficiency of Martinique's judicial system. *Id.*; cf. D.E. 171 (Bellecave Decl.) at ¶¶ 16-18. Therefore, based on the uncontested declaration of Ms. Casati-Ollier, the Court finds that Martinique is an adequate forum to adjudicate these actions.

c. Private Interest Factors[13]

First, although "there is normally a strong presumption that the plaintiff has chosen a sufficiently convenient forum," this presumption weakens "when the plaintiff is a foreigner litigating far from home." *Id.* at 1314-15. As previously noted, Plaintiffs are, and the decedents were, residents of Martinique; none of them are (were) U.S. citizens. Therefore, the presumption

[12] "Thus, where the allegations are insubstantially supported . . . a District Court may reject them without considering any evidence from the defendant. But where the plaintiff produces significant evidence documenting . . . delay (in years) typically associated with the adjudication of similar claims, and these conditions are so severe as to call the adequacy of the forum into doubt, then the defendant has the burden to persuade the District Court that the facts are otherwise." *Id.*

[13] "'Private interests' include . . . 'ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses . . . and all other practical problems that make trial of a case easy, expeditious and inexpensive.'" *Leon*, 251 F.3d at 1314 (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947)).

that Plaintiffs have chosen a sufficiently convenient forum in filing suit in the Southern District of Florida is entitled to less deference in this case. *See Leon*, 251 F.3d at 1315.[14]

With respect to ease of access to sources of proof, the Court finds that this factor favors Martinique over the United States. The parties agree that with respect to the Montreal Convention claims, Defendants' liability will not be at issue. *See* D.E. 163 (Counsel for Cimetier Defs.' Decl.) at ¶ 5; D.E. 170 (Pls.' Resp.) at 2; D.E. 179 (Cimetier Defs.' Reply) at 1; D.E. 180 (West Caribbean's Reply) at 2-3.[15] Thus, the principal contention between the parties herein will be the amount of damages to which each Plaintiff is entitled. In this

[14] The court is not persuaded by Plaintiffs' argument that they should be accorded "deference that is *equal* to that accorded to U.S. residents" because: (1) they have sued in one of the negotiated fora provided for in the Montreal Convention, or (2) as a matter of comity towards France. *See* D.E. 170 (Pls.' Resp.) at 12-13. The greater deference accorded to a U.S. resident follows from the reasonable assumption that a plaintiff choosing her home forum does so because it is convenient. *See Reyno*, 454 U.S. at 255-56. This assumption is not otherwise warranted. *Id.*; *cf. Pollux Holding Ltd. v. Chase Manhattan Bank*, 329 F.3d 64, 72-73 (2d Cir. 2003) (declining to afford the Liberian plaintiffs' forum choice the same deference afforded to a U.S. citizen's forum choice where the pertinent treaty did not grant Liberian nationals access to U.S. courts on terms no less favorable than those applicable to U.S. nationals).

[15] If the Motion is granted, Defendants are conceding that the damages sought are governed by Article 21(1) of the Montreal Convention, and will not resort to the defense available under Article 21(2). *See* D.E. 159 (Motion) at 15; D.E. (168) (Resp. to Court Order).

regard, Plaintiffs concede that "most if not all of the damages evidence is found in Martinique." D.E. 170 (Pls.' Resp.) at 15. Accordingly, evidence pertinent to the issue of damages – including the decedents' medical, employment and financial records, as well as testimony from the decedents' relatives, employers and physicians – will be more conveniently examined (both during discovery and at trial) in Martinique. To the extent that any of these records and witnesses are not willingly produced, this Court would not be able to *compel* their production and attendance. *See, e.g., Magnin*, 91 F.3d at 1430.[16] Even for those documents and witnesses that are available on a voluntary basis, the cost of producing them in this country, presumably in translated form, weighs in favor of litigation in Martinique. *Id.*[17]

[16] "Other factors that indicate France is the better forum for litigation of this case include the unavailability of compulsory process to secure attendance of French witnesses in a court in this country. . . ." *Id.* Plaintiffs suggest that this Court has treaty power to direct subpoenas to France, which would be served pursuant to the Hague Convention on Service Abroad, 20 U.S.T. 361. *See* D.E. 170 (Pls.' Resp.) at 18 (citing 28 U.S.C. §§ 1369, 1785, and referring to the Hague Evidence Convention (28 U.S.C. § 1781 note)); D.E. 171 (Bellecave Decl.) at ¶ 19. The Hague Conventions operate on the basis of letters of request, which are impractical in the instant actions given the number of potential records and witnesses, and that letters of request are notoriously time-consuming. *See Strategic Value Master Fund, Ltd. v. Cargill Fin. Servs. Corp.*, 421 F. Supp. 2d 741, 768-69 (S.D.N.Y. 2006).

[17] The Court notes that Plaintiffs have offered to bear the cost of "bring[ing] to trial" fact witnesses as to damages. *See* D.E. 170 (Pls.' Resp.) at 20. While this alleviates some of

Plaintiffs also refer to Defendants' potential claims for contribution against U.S. manufacturers. *See supra* part c. As to these potential third-party defendants, it is undisputed that evidence pertaining to claims sounding in products liability will be located in the United States, not in Martinique.[18] Plaintiffs do not contend, however, that the U.S. manufacturers cannot be impled [sic] in an action in Martinique. Plaintiffs have not shown that if the U.S. manufacturers are made parties to the action as Plaintiffs contemplate, evidence in the possession and/or control of the U.S. manufacturers will not be available in a proceeding in Martinique. *Cf., e.g.*, D.E. 162 (Casati-Ollier Decl.) at ¶¶ 10-15 (outlining the procedures available under the French judicial system to, *inter alia*, ensure the parties' production of evidence). In this regard, the private interest considerations in the instant cases are indistinguishable from those in

Defendants' potential costs, the offer does not extend to the expensive proposition of conducting discovery respecting non-party witnesses in Martinique, which can be expected to include travel, lodging, and translation costs.

[18] According to Plaintiffs, there is evidence that the aircraft's systems that monitored and controlled engine power were deficient. In this regard, Plaintiffs identify the Boeing Company, successor to the aircraft's manufacturer, McDonnell Douglas, as a potential third-party Defendant. *See* D.E. 170 (Pls.' Resp.) at 6 (also noting the absence of a "stick pusher" device that would aid in the recovery from an aerodynamic stall). Plaintiffs also cite deficiencies in the engines and identify the engines' manufacturer, Pratt and Whitney, in this regard. *Id.* Finally, Plaintiffs identify Honeywell Bendix, manufacturer of the aircraft's weather radar, as another potential third party defendant. *Id.* Plaintiffs submit that the records pertinent to these components are located in the United States. *Id.* at 16.

numerous cases in which *forum non conveniens* dismissals have been granted in products liability actions against U.S. aircraft and part manufacturers. *See, e.g., Reyno*, 454 U.S. 235; *Magnin*, 91 F.3d 1424; *Satz*, 244 F.3d 1279. Thus, while ease of access to the manufacturers' evidence would be greater in this forum (*see Reyno*, 454 U.S. at 257), the Court finds that this factor is of lesser concern when compared to the inconvenience of accessing evidence pertaining to damages, in Martinique, respecting more than a hundred decedents and their beneficiaries.

Moreover, it is important to note that the private interest considerations are intended to address the convenience of the parties. *See Leon*, 251 F.3d at 1311. As previously noted, it is Defendants who seek dismissal of this action in favor of Martinique. Thus, if Defendants decide to assert third party claims against the U.S. manufacturers in Martinique, Defendants will be the parties prejudiced by any inconvenience related to accessing third-party liability evidence in the United States or elsewhere. Again, Plaintiffs have not established that *they will* be inconvenienced by the potential litigation against the U.S. manufacturers in Martinique. *See supra* n. 10. Plaintiffs have not filed actions in this forum against the U.S. manufacturers and the Court is not convinced by Plaintiffs' bare assertion that if the actions are taken to Martinique they will do so therein. *Id.*

Plaintiffs also refer to non-party liability evidence located in Colombia, Venezuela[19] and

[19] As previously noted, West Caribbean's aircraft crashed in Venezuela. However, the location of the accident,

Panama. *See* D.E. 170 (Pls.' Resp.) at 16-17, 18. However, Plaintiffs concede that "the court in Martinique will be no better at compelling the production of evidence from those countries than this Court will." *Id.* at 17. Therefore, this factor does not favor either forum.

Plaintiffs further contend that "[t]he burden of translating relatively simply [sic] damages evidence into English is far outweighed by the burden that would be imposed if all the liability evidence, in English and Spanish, had to be translated into French." *Id.*[20] However, Plaintiffs do not contend that this burden will be theirs to bear. Under Plaintiffs' contemplated scenario – *i.e.* Defendants suing U.S. manufacturers for contribution in Martinique – Plaintiffs' argument is not persuasive; Defendants and the U.S. manufacturers would incur these costs.

Plaintiffs also make brief general references to: (1) FAA and NTSB records in Washington pertaining to the certification and safety of U.S.-made aircraft and component parts; and (2) government accident investigators in the United States. *See* D.E. 170 (Pls.' Resp.) at 16, 18.[21] How-

by itself, is not one of the "jurisdictions" where an action for damages under the Montreal Convention may be brought. *See* Montreal Convention, art. 33.

[20] According to Plaintiffs "liability evidence consists of highly technical documents and testimony that often are hard to understand, even by native speakers." *Id.*

[21] There is no indication that the accident at issue is being investigated by the NTSB. "The investigation is being conducted by the Venezuela Comite de Investigacion de Accidentes Aereos." *See* <http://www.ntsb.gov/ntsb/GenPDF.asp?id=DCA05RA093&rpt=fa> (NTSB Factual Report) (visited October 31, 2007).

ever, Plaintiffs have not explained the extent to which such evidence is public information or would require the issuance of compulsory process. Plaintiffs, thus, have not shown that this type of evidence will be less accessible in Martinique.

In sum, even after according Plaintiffs the deference they are due, and considering the potential third-party claims, the private interests in these actions weigh in favor of Martinique.

f. Public Interest Factors[22]

The public interest factors also weigh in favor of Martinique. The decedents were residents of Martinique and the relief sought in each of the consolidated actions is a damages award that will benefit residents of Martinique. The Court finds that when compared to this forum, Martinique has a superior interest in the adjudication of actions that seek to redress injuries to a significant number of its residents. The interest of this forum relates to the conduct of Newvac, and potentially, the U.S. manufacturers. *See, e.g.*, D.E. 170 (Pls.' Resp.) at 5-6, 24-25 (describing Newvac's conduct), 6 (describing the manufacturers' conduct). While the Court appreciates that this forum has an interest in deterring the alleged tortious conduct of these and similar entities, this interest cannot be equated to that of Martinique, whose residents

[22] "Public interest factors 'include the sovereigns' interests in deciding the dispute, the administrative burdens posed by trial, and the need to apply foreign law.'" *Membreno v. Costa Crociere S.p.A.*, 425 F.3d 932, 937 (11th Cir. 2005) (quoting *Republic of Panama v. BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935, 953 (11th Cir. 1997)).

have been the ones affected by the immediate and tangible impact of the deaths at issue. *See, e.g., Gilbert*, 330 U.S. at 509 ("In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home."). Further, the deterring impact that a damages award may have cannot be said to be greater if the actions are pursued in this forum. *See, e.g., Reyno*, 454 U.S. at 260-61.

Moreover, from an administrative standpoint, "[t]he American interest in this accident is simply not sufficient to justify the enormous commitment of judicial time and resources that would inevitably be required if the case were to be tried here." *Id.* at 261. It is the Court's experience that live testimony given in a foreign language demands significantly more time from the Court given that the questions and answers need to be translated, and often times repeated. These actions likely will involve the presentation of live testimony and documentary evidence on damages relating to more than a hundred decedents and their beneficiaries. The Court acknowledges that if third-party U.S. manufacturers are impled [sic], live testimony on the liability portion of the proceedings would be more conveniently handled by this Court. However, the parties are in agreement that the TGI in Martinique will not hear live testimony; "parties, witnesses and experts appear only through written briefs." D.E. 171 (Bellecave Decl.) at ¶ 15; *accord* D.E. 162 (Casati-Ollier Decl.) at ¶ 10. Thus, although both fora face the potential

submission of translated testimony and documents, only the participants in trials in this Court would have to assume the burden of live contemporaneous translations. A trial in this forum would burden members of this community with jury duty under these circumstances, where, as already noted, the most significant interests are those of Martinique. *Cf. id.* at ¶ 8 (jury trial is unavailable in Martinique).

Finally, Defendants submit that if the actions remain here the Court would need to apply French law. *See* D.E. 159 (Motion) at 23-25. Plaintiffs posit, however, that assuming Defendants are correct, the Court would only need to apply French law as to damages and that French law is not much different than Florida law. *See* D.E. 170 (Pls.' Resp.) at 25-26. Plaintiffs submit that in contrast, if the third-parties are sued in Martinique, those claims would be governed by the laws of each of the U.S. manufacturers' domicile states. *Id.* at 26 (citing to the Hague Convention on the Law Applicable to Products Liability). If Plaintiffs are correct,[23] this factor would weigh in favor of this forum. However, this factor is not dispositive[24] and, on balance, the public interest factors favor Martinique.

[23] The Court finds the parties' filings on the choice of law issue insufficient to make a reasoned determination on whether and to what extent either forum would need to apply foreign law. However, this factor does not alter the Court's determination, even after assuming that Plaintiffs are correct.

[24] *See SME Racks, Inc. v. Sistemas Mecanicos Para Electronica, S.A.*, 382 F.3d 1097, 1104-05 (11th Cir. 2004).

g. Reinstatement of Suit

The Court must consider whether "the plaintiff can reinstate his suit in the alternative forum without undue inconvenience or prejudice." *Leon*, 251 F.3d at 1311. As previously noted, Defendants stipulate that if the Motion is granted, they will submit to the jurisdiction of, and accept service of process from, the courts of Martinique. *See* D.E. 159 (Motion) at 2, 12, 25. Further, Defendants are waiving any statute of limitations defenses. *Id.*; D.E. (168) (Resp. to Court Order).[25] It is undisputed that some Plaintiffs have already commenced proceedings against West Caribbean and its insurer, as well as American manufacturers, in Martinique. Moreover, Plaintiffs do not argue that they will be unable to reinstate their actions in Martinique, or that they will be unduly inconvenienced or prejudiced in doing so. Therefore, the Court is satisfied that Plaintiffs will be able to reinstate their suit in Martinique, and that they will be able to do so "without undue inconvenience or prejudice." *Leon*, 251 F.3d at 1311. Accordingly, it is

ORDERED AND ADJUDGED that Defendants' Motion (D.E. 159) is GRANTED. The actions specified *infra* are dismissed on the basis of *forum non conveniens*, without prejudice to their refiling in Martinique, France. It is further

[25] According to Ms. Casati-Ollier, "there is nothing [under French law] that prohibits the defendant from waiving the benefit of the limitation period of Article 35 of the Montreal Convention in a specific case." D.E. 162 (Casati-Ollier Decl.) at ¶ 23.

ORDERED AND ADJUDGED that Defendant Aseguradora Colseguros is dismissed without prejudice. *See supra* n. 2.

DONE AND ORDERED in Chambers at Miami, Florida, this 9 day of November 2007.

/s/ Ursula Ungaro
URSULA UNGARO
UNITED STATES DISTRICT JUDGE

(2)

No. 09-1569

IN THE

Supreme Court of the United States

SYLVIA BAPTE, Individually and as personal representative of the Estate of Christiane Bapte, deceased, STEPHANIE ISABELLE BAPTE, MARYVONNE BAPTE, et al.,

Petitioners,

—v.—

WEST CARIBBEAN AIRWAYS, a Colombian corporation, NEWVAC CORPORATION, a Florida corporation, GO 2 GALAXY, INC., a Florida corporation,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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COUNTER-STATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Whether the decision of the Court of Appeals below, finding that the District Court did not abuse its discretion in denying a Fed. R. Civ. P. 60(b) motion requesting that the District Court vacate an Order issued almost 2 years prior dismissing the case on the grounds of *forum non conveniens*, conflicts with the decision of this Court in *Gondeck v. Pan Am. World Airways, Inc.*, 382 U.S. 25 (1965) and the decision of the Court of Appeals for the Tenth Circuit in *Pierce v. Cook & Co.*, 518 F.2d 720 (10th Cir. 1975), each of which allowed relief from a merit-based dismissal of the action but only because (1) other victims of the same accident were permitted to recover by a different court interpreting the same law, and (2) the dismissal was deemed improper and inequitable due to an intervening change in the law (*Pierce*) or based on a later proper interpretation of the law (*Gondeck*).

PARTIES TO THE PROCEEDINGS

Plaintiffs in the Courts Below

A list of the plaintiffs is set forth in a separate letter dated June 23, 2010 filed by the Petitioners with the Court.

Defendants in the Courts Below

Defendants in the District Court and Court of Appeals below were as follows:

1. West Caribbean Airways, S.A., a Colombian air carrier which operated the chartered aircraft involved in this litigation.
2. Newvac Corporation, a small tour operator located in Florida.
3. Go 2 Galaxy, Inc., a small travel agency located in Florida.
4. Jacques Cimetier, a private individual who is the President of Newvac Corporation and Go 2 Galaxy, Inc.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUP. CT. RULE 29.6

Respondent West Caribbean Airways, S.A. is a Colombian air carrier organized and existing under the laws of Colombia, and currently is in bankruptcy. There is no parent corporation or publicly held corporation owning 10% or more of the stock of West Caribbean Airways, S.A.

Respondents Newvac Corporation and Go 2 Galaxy, Inc. are corporations organized and existing under the laws of Florida with their principal place of business in Florida. There is no parent corporation or publicly held corporation owning 10% or more of the stock of Newvac Corporation or Go 2 Galaxy, Inc.

TABLE OF CONTENTS

PAGE

COUNTER-STATEMENT OF THE QUESTION PRESENTED FOR REVIEW 1

PARTIES TO THE PROCEEDINGS ii

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUP. CT. RULE 29.6 iii

TABLE OF AUTHORITIES viii

STATUTORY PROVISIONS INVOLVED 1

OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI* 1

STATEMENT OF THE CASE 1

A. Relevant Facts 3

B. The In re West Caribbean Passenger Case 4

1. November 2007—FNC Dismissal of the Passenger Case 5

2. 2007—Petitioners Sue in Martinique 6

3. September 2009—District Court Denies Petitioners' Rule 60(b) Motion 7

4. October 2009—Court of Appeals Affirms Passenger FNC Order 9

PAGE

5. March 2010 – Court of Appeals Affirms Denial of Rule 60(b) Motion 10

C. The In re West Caribbean Airways Crew Case 10

1. September 2008 & May 2009 – Denial of FNC Motions in the Crew Case 11

2. August 2009 – Petitioners' Motion to Intervene in the Crew Case ... 12

3. May 2010 – The Crew Case Settles and Is Dismissed 13

REASONS FOR DENYING THE WRIT 13

I. THE PETITION SHOULD BE DENIED ON THE GROUNDS OF MOOTNESS BECAUSE THE CREW CASE HAS BEEN SETTLED AND DISMISSED 15

II. THE DECISIONS OF THE COURTS BELOW DO NOT CONFLICT WITH THE LANGUAGE OR INTENT OF THE MMTJA 16

A. The Alleged Misapplication of the MMTJA Was Never Argued as a Basis to Deny FNC Dismissal of the Passenger Case 17

PAGE

1. Petitioners' MMTJA Arguments Have Been Waived 20

2. Petitioners' Rule 60(b) Motion Was Untimely 23

B. Even If Petitioners' MMTJA-Based Arguments Had Been Properly Presented, the Decisions of the Courts Below Do Not Conflict with the Language or Purpose of the MMTJA 24

1. Consolidation Is Not Mandatory 24

2. FNC Dismissal Is Not Prohibited 27

3. Intervention Is Not Mandatory 31

III. THE RULE 60(B) DECISION OF THE COURT BELOW DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR THE COURTS OF APPEAL 34

CONCLUSION 38

APPENDIX

Order Denying Intervention, *In re West Caribbean Crew Members*, No. 07-22015 (S.D. Fla. Jan. 8, 2010) 1a

PAGE

Order of Dismissal, *In re West Caribbean Crew Members*, No. 07-22015 (S.D. Fla. June 21, 2010) 30a

Joint Notice of Settlement, *In re West Caribbean Crew Members*, No. 07-22015(S.D. Fla. June 1, 2010) 32a

Fed. R. Civ. P. 60(b)..... 36a

28 U.S.C. § 1407(a) 37a

TABLE OF AUTHORITIES

Cases: PAGE

Agostini v. Felton, 521 U.S. 203 (1997) 34

Am. Bankers Ins. Co. of Fla. v. Nw. Nat'l Ins. Co., 198 F.3d 1332 (11th Cir. 1999) 21

Ackerman v. U.S., 340 U.S. 193 (1950) 21

Bapte v. West Caribbean Airways, No. 09-1199, 2010 WL 1526373 (U.S. June 7, 2010).....6, 10, 14

Bapte v. Boeing Co., No. 10-10501 (11th Cir. docketed Feb. 4, 2010)..... 3, 13

Beta Upsilon Chi Upsilon Chapter at the Univ. of Fla. v. *Machen*, 586 F.3d 908 (11th Cir. 2009)..... 15

Bhd. of R.R. Trainmen v. Baltimore & Ohio R.R. Co., 331 U.S. 519 (1947)..... 32

Cavaliere v. Allstate Ins., Co., 996 F.2d 1111 (11th Cir. 1993) 23

Bapte v. *West Caribbean Airways, S.A.*, 2010 WL 1141063 (11th Cir. Mar. 25, 2010) (Pet. App. at 1a-4a).....1, 10, 11, 22, 30

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PAGE

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(J.P.M.L. 2004)..... 26

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303 F. Supp. 2d 1377 (J.P.M.L. 2004).. 26

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No. 06-22748 (S.D. Fla. Sept. 11, 2009)
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619 F. Supp. 2d 1299 (S.D. Fla. 2007)
("*WCA I*") 5

PAGE

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("*WCA II*") (Pet. App. at 36a-55a) 5-6, 29

In re West Caribbean Crew Members,
No. 07-22015 (S.D Fla. Notice of
Appeal filed July 19, 2010)..... 13

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165 Fed. Appx. 878 (2d Cir. 2005) 32

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Hynes & Lerach*, 523 U.S. 26 (1998).... 28

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(9th Cir. 1995)..... 34n

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413 U.S. 345 (1973) 32

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PAGE

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U.S. CONST. art. III § 2 15

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PAGE

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Fed. R. Civ. P. 24 ..... 12, 24, 32

Fed. R. Civ. P. 24(a) 32

Fed. R. Civ. P. 24(a)(1) 12

Fed. R. Civ. P. 42 24

Fed. R. Civ. P. 60 ..... *passim*

Fed. R. Civ. P. 60(b) ..... *passim*

Fed. R. Civ. P. 60(b)(1) 23

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PAGE

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STATUTORY PROVISIONS INVOLVED

The relevant parts of Fed. R. Civ. P. 60 and 28 U.S.C. § 1407 are set forth in the Appendix ("Opp. App.") hereto at 36a-37a.

OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI*

Respondents Newvac Corporation and Go 2 Galaxy, Inc. (collectively "Newvac") and West Caribbean Airways, S.A. ("WCA") respectfully request that the Court deny the Petition for Writ of *Certiorari* ("Petition") seeking review of the opinion of the Court of Appeals for the Eleventh Circuit in *Bapte v. West Caribbean Airways, S.A.*, 2010 WL 1141063 (11th Cir. Mar. 25, 2010), reproduced in the Appendix to the Petition ("Pet. App.") at 1a-4a, wherein the Court of Appeals affirmed, as amended, the Order of the District Court denying Petitioners' motion for relief pursuant to Fed. R. Civ. P. 60(b). *In Re West Caribbean Airways*, No. 06-22748 (S.D. Fla. Sept. 11, 2009) (Pet. App. at. 5a-11a).

STATEMENT OF THE CASE

This litigation arises from the August 16, 2005 crash in Venezuela of WCA Flight 708 while en route from Panama to Martinique. All of the 152 passengers and 8 crew members on board the aircraft perished in the accident. The passenger-decedents were residents of Martinique, a Department of France; none were citizens or residents of the U.S. The entire crew, employed by WCA, were residents of Colombia.

This accident spawned numerous lawsuits in Florida and Martinique filed by both representatives of the passengers and representatives of the crew members. Set forth below is the detailed procedural history of this litigation to provide an accurate picture of the many opportunities that Petitioners had to present all of their arguments. Refusing to accept the decisions of the Courts below finding that Martinique (the residence of the plaintiffs and passengers-decedents), not Florida, is the most convenient forum for the determination of their damages, Petitioners have invoked every procedural mechanism here and in Martinique to attack or subvert the District Court's *forum non conveniens* ("FNC") dismissal. As the District Court recently stated in the Order denying Petitioners' motion to intervene in the Crew Case:

> the Motion to Intervene is essentially an attack on this Court's previous *forum non conveniens* rulings. [footnote omitted] Nothing prevented the Bapte Plaintiffs from asserting product-liability claims against the U.S. Defendants in the Passenger Case, the existence of which would have been considered in the Passenger Case *forum non conveniens* analysis. And similarly, nothing prevented the Bapte Plaintiffs from moving to intervene prior to the extensive *forum non conveniens* litigation in this case. Instead, the Bapte Plaintiffs now argue that they are effectively entitled both to a do-over of their *forum non conveniens* litigation in the Passenger Case and to cir-

> cumvent the *forum non conveniens* litigation in the Crew Member Case by way of a late-in-the-game intervention. However, the Bapte Plaintiffs are not so entitled.
>
> * * *
>
> Finally, after years of litigation in both the Passenger and Crew Member Cases, the Bapte Plaintiffs' recent attempts at reversing the course of their litigation are highly irregular, when viewed from the ground-level and in the totality of the circumstances. While the Bapte Plaintiffs themselves sit, uncompensated for their losses despite the damage awards awaiting them in Martinique, counsel for the Bapte Plaintiffs seem intent on engaging in last-minute procedural maneuvering with no clear relation to their clients' interests.

In re West Caribbean Crew Members, No. 07-22015, Opp. App. at 26a-28a (S.D. Fla. Jan. 8, 2010), *appeal docketed*, No. 10-10501 (11th Cir. Feb. 4, 2010); *see also* Pet. App. at 6a, n.4 (same). Of particular significance is that the Crew Case has been settled and dismissed (Opp. App. at 30a-32a), and the claims of the representatives of many of the other deceased passengers are being swiftly resolved in Martinique (Opp. App. at 7a).

A. Relevant Facts

On March 25, 2005, Newvac entered into a charter contract with WCA in Colombia pursuant to which WCA was to provide a 152-passenger MD-82 aircraft and crew for round-trip flights

from Martinique to Panama during May-August 2005. After entering into the charter contract with WCA, Newvac contracted with Globe Trotter, a Martinique travel agency, whereby it agreed to provide the WCA aircraft to Globe Trotter for a series of excursions between Martinique and Panama. The vacation packages were then sold by Globe Trotter to individual passengers in Martinique. The accident occurred on August 16, 2005 when the WCA aircraft crashed in Venezuela during a return trip from Panama. This litigation followed.

B. The In re West Caribbean Passenger Case

Representatives of the 152 passengers-decedents involving over 665 Martinique beneficiaries filed three separate actions in the Southern District of Florida against WCA, Newvac, Go 2 Galaxy and Jacques Cimetier (the President of Newvac/Go 2 Galaxy).

The first two actions were filed in November 2006 by the Petitioners (*Bapte* Plaintiffs) and the *Galbert* Plaintiffs, and a third action was filed in 2007 by the *Cadare* Plaintiffs. These three actions (collectively "Passenger-Plaintiffs" or the "Passenger Case") were consolidated before the District Court below under *In Re West Caribbean Airways*, No. 06-22748 (S.D. Fla.). The Passenger-Plaintiffs in each action sought to recover damages for the deaths of the 152 passenger-decedents pursuant to the terms of the Montreal Convention,[1] which exclusively governs the rights and

[1] Convention for the Unification of Certain Rules for International Carriage by Air, done at Montreal on 28 May

liabilities of passengers and carriers for passenger death occurring during the course of international carriage by air.

Eventually, only WCA and Newvac remained in the Passenger Case and they moved for FNC dismissal in favor of Martinique.

1. November 2007—FNC Dismissal of the Passenger Case

By Preliminary Order dated September 27, 2007, the District Court found that Newvac was a "contracting carrier" within the meaning of Article 39 of the Montreal Convention, and therefore, had treaty subject-matter jurisdiction pursuant to Article 33, but that it nevertheless could utilize the procedural mechanism of FNC in order to dismiss a lawsuit with little or no connection to the chosen forum. *In re West Caribbean Airways, S.A.*, 619 F. Supp. 2d 1299, 1305-28 (S.D. Fla. 2007).

In a second order dated November 9, 2007, the District Court addressed the merits of the FNC motion. *See In re West Caribbean Airways, S.A.*, No. 06-22748, Pet. App. at 36a-55a (S.D. Fla. Nov. 9, 2007) ("Passenger FNC Order"). Newvac and WCA agreed not to contest liability as a condition for FNC, and the parties agreed that with respect to the Montreal Convention claims Respondents' liability would not be at issue. Pet. App. at 46a. Thus, the principle focus of the FNC inquiry was damages.

1999, ICAO Doc. No. 9740 (entered into force Nov. 4, 2003), *reprinted in* S. Treaty Doc. 106-45, 1999 WL 33292734.

After considering the adequacy of the alternative forum (Martinique) and the deference owed to the Rassenger-Plaintiffs' choice of forum, the District Court balanced each of the public and private interest factors and granted the FNC motion, finding that Martinique was the more convenient forum for resolution of the damage claims. *Id.* at 45a-55a

As discussed *infra* at 9, both Orders were affirmed in *Pierre-Louis v. Newvac Corp.*, 584 F.3d 1052 (11th Cir. 2009), *cert. denied sub nom. Bapte v. West Caribbean Airways*, No. 09-1199, 2010 WL 1526373 (U.S. June 7, 2010).

2. 2007—Petitioners Sue in Martinique

In August 2007, prior to the FNC dismissal of the Passenger Case, the Passenger-Plaintiffs commenced litigation in Martinique asserting products liability and negligence causes of action against Boeing, Pratt & Whitney, and United Technologies Corporation. None of the Passenger-Plaintiffs filed a lawsuit against any of the manufacturing defendants in the U.S. and Petitioners represented to the District Court that they did *not* intend to pursue their own product liability claims in the U.S. *See* Pet. App. at 6a, n.2; Opp. App. at 5a-6a.

While the appeal of the Passenger FNC Order was pending, Petitioners also sued Newvac and WCA in Martinique pursuant to the Montreal Convention. Although Petitioners made marginal attempts to comply with the District Court's order to re-file their actions in Martinique within six months of dismissal, they did so with the sole

intent to persuade the French courts to reject their claims. Petitioners instituted writs before the French court demanding that the French tribunal declare that it *lacked* jurisdiction to entertain the claims and refuse to accept jurisdiction. Pet. App. at 6a, n.2; Opp. App. at 5a, n.9.

On August 24, 2009, the French court in Martinique issued an order rejecting the Petitioners' claim that the French court lacked jurisdiction to entertain their claims. (Pet. App. at 8a, n.4. "By all accounts, the Passenger Case has successfully proceeded in Martinique. In those proceedings, as stipulated, the Carrier Defendants, including Newvac and West Carribean [sic] have conceded liability and waived the Montreal Convention damages caps, leaving only the calculation of damages at issue. Numerous Passenger Plaintiffs already have been awarded damages." Opp. App. at 7a (citations omitted).

3. September 2009—District Court Denies Petitioners' Rule 60(b) Motion

On August 28, 2009, also while the appeal of the Passenger FNC Order was pending, Petitioners moved the District Court in the Passenger Case for Rule 60(b) relief. Petitioners argued that in light the District Court's order denying defendants' FNC motion in the Crew Case (*see In re West Caribbean Crew Members*, 632 F. Supp. 2d 1193 (S.D. Fla. 2009) (Pet. App. at 12a-33a) ("Crew FNC Order"), the Passenger FNC Order granting dismissal was inequitable and the FNC public factors and the private factors no longer favored dismissal.

On September 11, 2009, the District Court denied the Rule 60(b) motion. *See* Pet. App. at 5a-11a. The District Court held that due to the pendency of the appeal, it had no jurisdiction to rule on the motion, and thus denied the motion for lack of jurisdiction. Nonetheless, the District Court informed the parties that it would have denied the motion on the merits if it had jurisdiction because Petitioners presented no equitable reason for the grant of relief. *Id.* at 6a.

The Court stated that the passenger claims in the French court and the product liability Crew Case were materially different and posed no danger of inconsistent results: in Montreal Convention cases, the carriers' fault is presumed; in product liability cases, complicated issues of product defect and causation on the part of the aircraft's manufacturers, lessors, lessees and owners must be addressed. *Id.* at 8a-9a. The Court noted that in the Montreal Convention cases pending before the French Court, WCA appeared, but that the District Court could not assert jurisdiction over WCA in Miami. *Id.* at 7a. The District Court also noted that under any theory, the Passenger-Plaintiffs would be entitled to one recovery and those damages would have to be assessed under the law of the place with the most significant relationship to the issue of damages. *Id.* at 9a. In the case of Petitioners, French law.

Finally, the District Court rejected the Petitioners' argument that "somehow the Court's May 13, 2009 order denying [the FNC motion] in the Crew Member Case, triggered the application of 28 U.S.C. § 1369 by establishing the Southern

District of Florida as the single forum for resolution of all claims arising out of the West Caribbean crash." Pet. App. at 9a. The Court correctly found that "the statute simply provides for this Court to have original jurisdiction over all claims arising from the disaster," and "[i]t was in the exercise of that jurisdiction that the Court determined that the doctrine of *forum non conveniens* warranted re-filing of the wrongful death claims arising under the Montreal Convention in the French court in Martinique." *Id.* at 9a-10a.

Petitioners appealed the Order denying the Rule 60(b) motion and that appeal was pending when the Court of Appeals issued its decision affirming the Passenger FNC Order.

4. October 2009—Court of Appeals Affirms Passenger FNC Order

On October 8, 2009, the Court of Appeals affirmed the Passenger FNC Order. *Pierre-Louis*, 584 F. 3d 1052. The Court of Appeals held that the Montreal Convention does not prohibit a court from dismissing a case on FNC grounds and found no merit to the Passenger-Plaintiffs' argument that the District Court abused its discretion in analyzing the relevant private and public interest factors. Thoroughly aware of the denial of the Crew Member FNC motion, the Court of Appeals addressed Petitioners' contention that the rulings were fundamentally inconsistent and found that because the product liability claims were distinct from the Passenger-Plaintiffs' claims under the Montreal Convention, there was no inconsistency. *Id.* at 1060, n.9.

After the denial of rehearing, Petitioners filed a Petition for a Writ of *Certiorari* on March 30, 2010 and *certiorari* was denied on June 7, 2010. *Bapte*, 2010 WL 1526373.

5. March 2010—Court of Appeals Affirms Denial of Rule 60(b) Motion

On March 25, 2010, the Court of Appeals affirmed the denial of Petitioners' Rule 60(b) motion. The Court found that the District Court's holding that it lacked jurisdiction to rule on the motion was harmless error, and affirmed the denial of the Rule 60(b) motion because the motion did not assert adequate grounds for relief from judgment because the "denial of a motion to dismiss the crew cases on *forum non conveniens* grounds did not make continued application of its dismissal of the passenger cases inequitable." Pet. App. at 4a. The Court of Appeals also rejected Petitioners' argument that vacation of the FNC Order was required because 28 U.S.C. § 1369 unconditionally permitted them to intervene in the Crew Case, stating: "We agree, however, with the district court's well-reasoned analysis on page four of its order explaining that 28 U.S.C. § 1369 merely provides the court with jurisdiction over all claims arising out of the disaster and that it exercised that jurisdiction when it applied the doctrine of *forum non conveniens* to dismiss the passenger cases." Pet. App. at 4a.

C. The In re West Caribbean Airways Crew Case

Concurrent with the Passenger Case litigation discussed above, representatives of 7 deceased

Colombian crew members brought wrongful death actions against American manufacturers, former owners and operators of the aircraft, and Newvac based on negligence and products liability in the Southern District of Florida. The 7 crew actions were consolidated before the District Court under *In re West Caribbean Airways Crew Members*, No. 07-22015 (S.D. Fla.).

1. September 2008 & May 2009—Denial of FNC Motions in the Crew Case

All defendants concurrently moved to dismiss the Crew Case (products liability claims) on FNC grounds. On September 30, 2008, the District Court denied FNC dismissal in favor of Martinique "mainly because the Court was not persuaded that a French (European Union) Court would have jurisdiction over the claims of the estates of the deceased Colombian crew members against U.S. corporations for an accident in Venezuela." Pet. App. at 8a, n.4; *see In re West Caribbean Crew Members*, No. 07-22015 (S.D. Fla. Sept. 30, 2008).

On May 14, 2009, the District Court denied a second FNC motion to dismiss the Crew Case but this time in favor of Colombia finding, *inter alia*, that the Crew Case involved few foreign plaintiffs and, therefore, the administrative burden on the court in Florida would not be excessive. Pet. App. at 29a-30a, 32a.

2. *August 2009—Petitioners' Motion to Intervene in the Crew Case*

Following the denial of the second FNC motion in the Crew Case in May 2009—three years after they filed their complaints in the U.S. and Martinique, and two years after the Crew Case was filed—on August 13, 2009, Petitioners moved to intervene in the Crew Case to assert their product liability claims against certain U.S. defendants. Both the Crew Member plaintiffs and defendants objected to the intervention.

Petitioners argued that 28 U.S.C. § 1369(d) provided them an unconditional and independent right to intervene and, in the alternative, that they are entitled to intervene as of right pursuant to Fed. R. Civ. P. 24(a)(1). On January 8, 2010, the District Court denied the motion to intervene in the Crew Case as untimely, finding that § 1369(d) does not create a right to intervene outside of Rule 24, and the Petitioners' motion to intervene did not satisfy the timeliness requirements of Rule 24(a)(1). The Court concluded:

> In sum, the Bapte plaintiffs now seek to undo strategic decisions they made years ago. Their motives are highly questionable, and none of the relevant factors weighs in favor of intervention. Indeed, the Bapte Plaintiffs have not cited and the Court has not discovered a single case of record supporting intervention under similar circumstances. Thus, the Court, in its discretion, denies the Motion to Intervene as untimely.

Opp. App. at 28a.

Petitioners' appeal of this Order currently is pending before the Court of Appeals. *Bapte v. Boeing Co.*, No. 10-10501 (11th Cir. docketed Feb. 4, 2010).

3. May 2010—The Crew Case Settles and Is Dismissed

In the meantime, the Crew Member plaintiffs and the defendants engaged in settlement discussions, and they informed the District Court of a pending settlement on May 24, 2010. On June 21, 2010, the District Court issued an Order of Dismissal. Opp. App. at 30a. This too has now been appealed by Petitioners to the Court of Appeals (albeit their standing to do so is not readily apparent.). *In re West Caribbean Crew Members*, No. 07-22015 (S.D. Fla. Notice of Appeal filed July 19, 2010).

REASONS FOR DENYING THE WRIT

Petitioners present two questions for review based on an alleged misapplication of the Multiparty, Multiforum Trial Jurisdiction Act of 2000 ("MMTJA"), 28 U.S.C. § 1369 *et seq.* by the Courts below. Interwoven throughout the Petition are arguments that the District Court also erred because the denial of the Rule 60(b) motion precluded them from intervening in the Crew Case to re-assert their Montreal Convention claims.

As an initial matter, in light of the fact that the Crew Case has been settled and dismissed (Opp. App. at 30a-32a), there is no longer any case in which Petitioners can intervene and the questions

presented for review are rendered moot. The Petition should be denied on this ground alone.

Even if the Petition is not moot, it fails to present any question requiring review. Regardless of how the Petitioners frame the "Questions Presented," the Petition is in actuality a second request to review the Passenger FNC Order. In the first Petition for Writ of *Certiorari* filed on May 5, 2010, Petitioners maintained, *inter alia*, that the Courts below misapplied the Montreal Convention and the public and private factors governing the application of FNC. This Court denied *certiorari*. *Bapte*, 2010 WL 1526373. Now, Petitioners request review of the denial of a Rule 60(b) motion that sought to vacate the same FNC Order, but this time based on an alleged misapplication of the MMTJA. Neither the alleged misapplication of the MMTJA nor the propriety of intervention were presented by Petitioners in their opposition to the FNC motions, on appeal of the Passenger FNC Order, or in the first Petition for Writ of *Certiorari*. Thus, the only question that may properly be considered by the Court for review at this time is whether the decision of the Court of Appeals finding that the District Court did not abuse its discretion in denying the Rule 60(b) motion conflicts with the any decision of this Court or a Court of Appeals. Any other issue is untimely or has been waived.

I

THE PETITION SHOULD BE DENIED ON THE GROUNDS OF MOOTNESS BECAUSE THE CREW CASE HAS BEEN SETTLED AND DISMISSED

Petitioners seek review of the denial of their Rule 60(b) motion which sought to vacate the Passenger FNC Order in order to allow them to obtain "uniform redress and relief," avoid duplicative litigation and costs and prevent inconsistent factual findings and results stemming from separate lawsuits. Petition at 5, 9-11, 15. In light of the settlement and dismissal of the Crew Case, the Petition should be denied as moot. *See* Opp. App. at 30a-31a.

Mootness is a jurisdictional question because the exercise of judicial power under Article III of the Constitution depends on the existence of a live case or controversy. U.S. CONST. art. III § 2; *North Carolina v. Rice*, 404 U.S. 244, 246 (1971); *see also Beta Upsilon Chi Upsilon Chapter at the Univ. of Fla.* v. *Machen*, 586 F.3d 908, 918 (11th Cir. 2009) ("We lack the power to retain jurisdiction over a moot controversy for the purpose of rendering an advisory opinion."). Thus, a case is moot when the court cannot provide meaningful relief. *Florida Ass'n of Rehab. Facilities, Inc.* v. *Fla. Dep't of Health and Rehab. Servs.*, 225 F.3d 1208, 1217 (11th Cir. 2000).

Shortly before the filing of the Petition, the Crew Case was settled by the parties and the District Court dismissed the action in its entirety on July 21, 2010. Opp. App. at 30a-31a. Thus, the

alleged concerns of Petitioners no longer apply—there is in fact *no* risk of inconsistent factual findings and *no* risk of additional costs associated with duplicative lawsuits.

The Petition should be denied as there is no case in which Petitioners could intervene.

II

THE DECISIONS OF THE COURTS BELOW DO NOT CONFLICT WITH THE LANGUAGE OR INTENT OF THE MMTJA

Petitioners invite this Court to consider the interplay between 28 U.S.C. §1369 and the doctrine of FNC—an argument that was available at all times but never presented to the District Court, the Court of Appeals or this Court. Contending that intervention is mandatory, Petitioners argue that the District Court abused its discretion when it failed to vacate the Passenger FNC Order so that the Petitioners could intervene to re-assert their Montreal Convention claims and obtain "relief" (*i.e.*, damages) in the Crew Case.

The crux of Petitioners' argument appears to be that all proceedings subject to 28 U.S.C. §1369 must be "consolidated into a single, Multi-District Litigation proceeding," and that once "consolidated," FNC dismissal of less than all actions is prohibited. Petition at i, 14. Petitioners' "all or nothing" approach to FNC dismissal is legally baseless, demonstrates a fundamental misapprehension of §1369 and the MDL procedure process under 28 U.S.C. §1407, and largely ignores the

particular facts and legal arguments presented (and not presented) to the Courts below. In effect, Petitioners improperly seek to use Rule 60(b) to present arguments that should have been presented to the district or appellate court, but were not, in another attempt to attack the Passenger FNC Order affirmed by the Court of Appeals.

A. The Alleged Misapplication of the MMTJA Was Never Argued as a Basis to Deny FNC Dismissal of the Passenger Case

During the pendency of their actions, Petitioners never moved to consolidate the Passenger Case with the Crew Case; never sought to intervene in the Crew Case; and never argued, in opposing FNC dismissal or seeking reversal of the Passenger FNC Order, that the MMTJA required consolidation and precluded FNC dismissal of the passenger actions. In fact, the argument that the MMTJA somehow precludes FNC dismissal was not presented in the Rule 60(b) motion in the District Court and was only alluded to on appeal of the Rule 60(b) motion and in the motion to intervene in the Crew Case filed on August 13, 2009.

Petitioners now seek to excuse their failure to timely raise these arguments by claiming that the MMTJA arguments were somehow not available until the May 13, 2009 denial of the Crew FNC motion, at which time the MMTJA sprang into effect to create what Petitioners refer to as §1369 "anchor" jurisdiction. Petitioners argue:

- "The rejection of FNC for the Crew drastically changed the circumstances

surrounding the previous FNC dismissal of Petitioners' case because it, for the first time, established a §1369 action for all who died in the Flight 708 accident." (Petition at 8);

- "It was not until the District Court's May 13, 2009 Order denying FNC dismissal in the Crew Members action [App. 3] that Petitioners first learned that the District Court considered itself to be the most convenient forum to adjudicate a 28 U.S.C. §1369 proceeding for the instant airline disaster." (Petition at 18)[2]; and
- "Once the Crew Members jurisdictionally established a §1369 proceeding in the District Court, Petitioners filed their Rule 60(b) Motion for Relief asking the District Court to grant relief from the prior FNC Order dismissing their case." (Petition at 9).

Petitioners' arguments are incorrect.

Jurisdiction under §1369 either exists or not based on the facts of the cases when filed – it does not somehow later "spring" into existence. Here, the facts as to whether §1369 jurisdiction was pre-

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[2] "The Court did not, as [Petitioners] argue, in its May 2009 order denying *forum non conveniens* dismissal in the Crew Member Case 'consider itself the most convenient forum to adjudicate the product liability and negligence claims of foreign plaintiffs.' The Court decided only the issue before it, *i.e.*, that it was a more convenient forum for the claims of the Crew Member Plaintiffs than was Colombia." Opp. App. at 17a, n.16 (citations omitted).

sent existed on the date the complaints were filed and had nothing to do with the May 2009 Crew FNC Order. Petitioners overlook:

- the Crew Case complaint asserted §1369 as the basis for jurisdiction;
- both the *Galbert* Plaintiffs and the *Cadare* Plaintiffs complaints asserted §1369 as the basis for jurisdiction;
- this same alleged "anchor" jurisdiction Petitioners claim was created by the May 2009 denial of the crew member FNC motion seeking dismissal in favor of Colombia would also have been created with the September 2008 denial of the crew member FNC motion seeking dismissal in favor of Martinique; and
- More than one year before the May 2009 Crew FNC Order was issued, Petitioners specially asserted in the "Statement of Jurisdiction" in their opening appellate brief of the appeal of the Passenger FNC Order that "the District Court had original jurisdiction over these actions pursuant to 28 U.S.C. §1369, the Multiparty, multiform jurisdiction provision. . . ." [sic]. Appellants' Initial Consolidated Brief, No. 07-1528 at 2 (11th Cir. filed on Mar. 24, 2008).

Thus, there is no excuse for Petitioner's failure to present the MMTJA arguments in their FNC opposition papers or appellate briefs related to the

Passenger FNC Order or to the District Court below in the Rule 60(b) motion. Petitioners' argument is waived.

Indeed, it was not until Petitioners filed their Rule 60(b) motion that they informed the District Court that they moved to intervene in the Crew Case and that the MMTJA supported such intervention. Similarly, it was not until Petitioners moved in August 2009 to intervene in the Crew Case that they argued FNC denial of the Passenger Case was precluded by the MMTJA. Petitioners now fault the Courts below for not specifically addressing each of their MMTJA arguments (Petition at 10) even though they presented no argument in support of this contention. *See* Opp. App. at 5a, n.8 ("neither the Bapte Plaintiffs, nor any other Passenger Plaintiffs, argued that 28 U.S.C. § 1369 required that all litigation involving the subject accident be resolved in this forum, which the Bapte Plaintiff now belatedly argue in their Motion to Intervene"). The only issue which the District Court could properly consider under Rule 60(b) was whether inequity resulted from the Passenger FNC Order.

1. Petitioners' MMTJA Arguments Have Been Waived

Even if the Rule 60(b) motion can be construed to have raised the MMTJA argument, the argument was improper and waived because it should have been but was not presented to the District Court and the Court of Appeals with respect to the Passenger FNC motion and appeal. An appeal of a ruling on a Rule 60(b) motion is narrow in scope,

addressing only the propriety of the denial or grant of relief and does not raise issues in the underlying judgment for review. *See Browder v. Dir., Dep't of Corrections*, 434 U.S. 257, 263 n.7 (1978); *Am. Bankers Ins. Co. of Fla. v. Nw. Nat'l Ins. Co.*, 198 F.3d 1332, 1338 (11th Cir. 1999). Because of this limitation, the law is clear that Rule 60(b) may not be used to challenge mistakes of law which could have been raised on direct appeal. *Am. Bankers Ins.*, 198 F.3d at 1338; *see Ackerman v. U.S.*, 340 U.S. 193, 197-202 (1950) (a party may not use a Rule 60(b) motion as a substitute for an appeal, or as here, as a vehicle for a second appeal on the identical issue).

Petitioners' Rule 60(b) motion was simply a demand that the District Court revisit the Passenger FNC Order. As grounds for their Motion for Rule 60(b) Relief, Petitioners argued that the District Court's May 13, 2009 denial of the Crew Member FNC motion constituted changed circumstances which made continued application of the FNC dismissal inequitable. In light of this ruling, Petitioners claimed that the District Court weighed the FNC factors improperly. In other words, Petitioners focused on the merits of the underlying order and contended that the only equitable remedy would be to vacate the FNC Order. Pet. App. at 9a-11a. This very issue was addressed by the Court of Appeals in the decision affirming the Passenger FNC Order:

> The district court recently denied a dismissal on *forum non conveniens* grounds in the related case brought by the crew members who perished in the same crash

> as Plaintiffs. *In re: West Caribbean Airways Crew Members*, 632 F. Supp. 2d 1193 (S.D. Fla. 2009). Plaintiffs point out that the crewmembers, like Plaintiffs, are non-U.S. residents, and therefore litigation of their claim in a U.S. court gives rise to the same evidence issues the district court relied upon in dismissing their case on *forum non conveniens* grounds. We disagree. The crew member claims are product liability claims and thus are distinct from Plaintiffs' claims under the Montreal Convention, pursuant to which liability is presumed. We are therefore not persuaded that the district court's *forum non conveniens* analysis as to Plaintiffs' claims is inconsistent with, or should be affected by, its adjudication of the crew member claims in a U.S. forum.

Pierre-Louis, 584 F.3d at 1060, n.9.

The District Court's Order on the Rule 60(b) motion reflected this argument. The District Court considered the two actions and concluded that the Passenger Case was materially distinct from the product liability claims in the Crew Case and that the French court was the superior forum for the determination of damages in the Passenger Case. Pet. App. 6a-11a. The Courts below properly rejected the notion that 28 U.S.C. §1369 was anything more than a jurisdictional statute and the rulings of the Courts below effectively recognize that an appeal of a Rule 60(b) motion may not reargue the merits of an order which has been affirmed by the Court of Appeals. Pet. App. at 3a-4a, 9a-10a.

2. Petitioners' Rule 60(b) Motion Was Untimely

Finally, the underlying Rule 60(b) motion was itself untimely. Although the Rule 60(b) motion was denominated as a Rule 60(b)(5) and (6) motion, referring to those sub-parts which control motions to vacate based on "equitable" concerns, the motion was so named so as to step outside of the confines of Rule 60(b)(1), which mandates that a motion to vacate based on "mistakes," including mistakes in the law, be filed within one year from the entry of the final judgment. *See* Fed. R. Civ. P. 60(c).

The substance of Petitioners' Rule 60(b) motion was that the Passenger FNC Order was a result of a mistake in the law—the District Court incorrectly weighed the private and public interest factors and failed to properly apply the MMTJA (which was not fully articulated to the District Court in the Rule 60(b) motion). This is a mistake of law that falls under Rule 60(b)(1) and must be made within *one year* from entry of the order sought to be vacated. Fed. R. Civ. P. 60(c)(1).

It is well settled that Rule 60(b)(1) and Rule 60(b)(6) motions are mutually exclusive, and that a district court cannot grant relief under Rule 60(b)(6) for any reason the court could consider under (b)(1). *Cavaliere v. Allstate Ins., Co.*, 996 F.2d 1111, 1115 (11th Cir. 1993). The Passenger FNC Order was entered on November 13, 2007, and Petitioners Rule 60(b) motion was not filed until August 28, 2009, almost 22 months later. Accordingly, Petitioners' motion was untimely. *See* Fed. R. Civ. P. 60(c); *United States*

v. $1,449,473.32 in U.S. Currency, 152 Fed. Appx. 911, 912 (11th Cir. 2005).

The issues raised in the Petition herein were waived or untimely because Petitioners did not argue those issues to the Courts below or even to this Court, and a belated Rule 60(b) motion could not be used to assert these new arguments. Accordingly, the Rule 60(b) decisions of the Courts below were not an abuse of discretion and in no way conflict with Rule 60(b) or the MMTJA.

B. Even If Petitioners' MMTJA-Based Arguments Had Been Properly Presented, the Decisions of the Courts Below Do Not Conflict with the Language or Purpose of the MMTJA

Contrary to Petitioners' arguments, 28 U.S.C. §1369 does not limit the District Court's inherent discretion whether to order consolidation (Fed. R. Civ. P. 42), FNC dismissal, or intervention (Fed. R. Civ. P. 24).

1. Consolidation Is Not Mandatory

Petitioners argue that the failure to consolidate the Passenger and Crew Cases, and the denial of FNC dismissal of the Crew Case but grant of FNC dismissal in the Passenger Case conflicts with the MMTJA because (1) the MMTJA mandates that one litigation result in one judgment following an accident, and (2) even though §1369 allows FNC challenges, those challenges were required to apply to the entire action and not to particular plaintiffs. Petition at 13-14.

The purpose of the MMTJA is to address inefficiencies and inconsistencies of duplicate litigation arising from a single mass tort in cases where many lawsuits are filed in different jurisdictions (state and federal court) by different plaintiffs. It is intended to encourage joint adjudication through mechanisms designed to join additional related claims to claims already pending in federal court and to facilitate removal from state court. Thus, the MMTJA is a jurisdictional device allowing for consolidated proceedings before a single district court judge. *See* Rafouth, A., *Congress and the Multiparty, Multi forum Trial Jurisdiction Act of 2002: Meaningful Reform or A Comedy of Errors?*, 54 Duke L. J 255 (2004). The statute, however, does not affect a district court's inherent right to make its own substantive and procedural rulings, and thus it could have no effect on the District Court's discretion to dismiss the Passenger Case on FNC grounds. Contrary to Petitioners' contentions, the MMTJA does not permit or require a "consolidated" damage trial. *See infra* at 26-29.

Misapprehending the parameters of §1369, Petitioners argue that the District Court erred in failing to notify the Judicial Panel on Multidistrict Litigation ("JPMDL") of the pendency of the actions (Petition at 8, n.3, 16). No such notice was required. The Panel exists solely to determine whether cases "pending in different districts" should be transferred to a single district "for coordinated or consolidated pretrial proceedings" before a single judge. *See* 28 U.S.C. §1407(a); Herr, David F. *et al.*, *The Judicial Panel's Role in Managing Mass Litigation*, SN066 ALI-ABA 249,

254-255 (2008). In this case, no notification to the JPMDL was needed for the obvious reason that both the Passenger Case and the Crew Case were already before a single district court judge. Thus, there was no action that the JPMDL could transfer to the District Court for "*coordinated* or consolidated pretrial proceedings." 28 U.S.C. §1407(a). It is not clear what Petitioners claim the JPMDL could have done even if notice was provided—it had no authority to act under §1407 as the actions were not "pending in different districts" or, as discussed below, to consolidate the actions for liability or damage trial.

Next, the Petitioners complain that the failure to notify the JPMDL resulted in two separate cases, not one consolidated case, which allegedly was required under the MMTJA. Again, Petitioners are wrong. The function of the JPMDL is purely managerial and not adjudicative. *See* Herr, David F., *Multidistrict Litigation Manual, Practice Before the Judicial Panel on Multidistrict Litigation* at § 3.1 at 18 (West Publ. 2010). The JPMDL does not have the power to make any decision of a substantive or procedural nature or make any other orders in the actions. *Id.* The district court alone has the power to make procedural ("consolidation" vs. "coordination", FNC, intervention) and substantive rulings regarding its case. *See In re Am. Online Spin-Off Accounts Litigation*, 310 F. Supp. 2d 1369, 1370 (J.P.M.L. 2004) (Panel leaves to transferee court to distinguish between "coordination" and "consolidation"); *In re "Factor VIII or IX Concentrate Blood Products" Products Liability Litigation*, 303 F. Supp. 2d 1377 (J.P.M.L. 2004) (same); *In re Medical*

Waste Services Antitrust Litigation, 277 F. Supp. 2d 1382, 1383 (J.P.M.L. 2003) ("we leave the degree of coordination or consolidation of this action with the other actions to the discretion of the transferee judge").

Here, the District Court exercised its discretion. In response to a motion by the *Galbert* Plaintiffs, the District Court exercised its discretion to consolidate all the Passenger-Plaintiffs cases. In response to the defendants' motion to consolidate the seven crew member claims, the District Court consolidated all of the Crew Cases. At no time did the Petitioners move to consolidate the two cases, for intervention in the Crew Case, or complain to the District Court that such separate proceedings violated the MMTJA. Indeed, Petitioners advised the District Court that they had *no intention of filing claims against the manufacturers in the U.S.* *See* Opp. App. at 6a. Recognizing that the Montreal Convention claims and the product liability claims were materially distinct, it was thus within the discretion of the District Court to keep the two distinct cases separate and to dismiss one and not the other—the Passenger Case involved presumed liability under the Montreal Convention and *damages issues only*; the Crew Case involved product liability claims where *liability and damages* were contested.

2. FNC Dismissal Is Not Prohibited

Petitioners contend that the FNC decisions in the Passenger Case and Crew Case offend the MMTJA because the District Court came to different conclusions regarding the respective FNC motions. Petitioners offer no support for this con-

tention and nothing in the MMTJA requires consolidation or prohibited FNC dismissal of the Passenger Case. In fact, actions removed to federal court from state court pursuant to §1369, for instance, are clearly subject to an FNC analysis. *See* 28 U.S.C. §1441(e)(6) ("Nothing in this subsection shall restrict the authority of the district court to transfer or dismiss an action on the ground of inconvenient forum.").

While Petitioners admit that §1369 allows FNC motions, they claim such motions must address the "entire" action. Petition at 14, n.7. Again, Petitioners offer no authority to support that Congress sought to so limit the court's discretion—there is none. *See* Opp App. at 19a, n.18.

As originally drafted, one of the purposes of the MMTJA was to address the issue raised by the Court's decision in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998), by "bestow[ing] original jurisdiction on federal district courts in civil actions involving minimal diversity jurisdiction among adverse parties based on a single accident where at least 75 persons have died" and to allow "the district court in which such cases are consolidated . . .[to] retain those cases for determination of liability and punitive damages." H.R. Conf. Report No. 107-685 at 176 (2002); *Meaningful Reform*, 54 Duke L. J at 277-82. In this regard, 28 U.S.C. §1407 was to be amended to add sub-section (f) which would have allowed the MDL transferee court to retain the action for determination of liability and punitive damages. H.R. Rep. No. 107-14 at 7-8 (2001). While §1407(j) was not contained in the final ver-

sion enacted (though the reference remains in 28 U.S.C. §1441(e)(2)), the MMTJA drafters recognized that "damage issues often do not lend themselves to consolidated treatment because of necessary factual determinations relating to individual injury." *Meaningful Reform*, 54 Duke L. J at 270. In fact, 28 U.S.C. §1441(e)(2) recognizes that consolidation for "damages" was neither required nor necessary and, therefore, provides for remand of removed cases for damages trials once liability has been determined.

Petitioners ignore that the only issue that remained in the Passenger Case was the determination of damages of French plaintiffs under French law. Unlike the Crew Case where liability was at issue, Petitioners insisted, and Respondents agreed, only damages, not liability was at issue in the Passenger Case. *See* Pet. App. at 46a ("the parties agree[d] that with respect to the Montreal Convention claims, Defendants' liability will not be at issue" and that the principle contention will be the amount of damages); *see also* Opp. App. at 9a, n.14. Thus, not only is there nothing in the MMTJA that precluded FNC dismissal of the Passenger Case, FNC dismissal was fully consistent with the language and purpose of the MMTJA because only the determination of damages remained. In denying the Rule 60(b) motion, District Court correctly observed:

> [I]t is obvious that litigation in Martinique on the Montreal Convention claims will best serve the "Bapte" Plaintiffs' interests. Unlike in the Crew Member Case where liability is contested and

> not likely to be resolved for some time, the "Bapte" Plaintiffs and the estates of the other passengers will be able to obtain a prompt and possibly full recovery in the French court.
>
> In sum, the "Bapte" Plaintiffs have failed to demonstrate that continued application of the FNC Order is no longer equitable or that any other of the reasons they cite justifies relief. In fact, the French court in Martinique clearly can provide speedier and more complete justice than possibly can be provided in this forum. Therefore, the FNC Order was and remains entirely in the "Bapte" Plaintiffs' interests and legally correct.

Pet. App. at 10a.

The interplay and effect of the Passenger FNC Order and the denial of the Crew Member FNC motion has been addressed (twice) by the Court of Appeals. In the Order affirming the Passenger FNC Order, the Court of Appeals found that the District Court's FNC analysis as to the Passenger Case claims was *not inconsistent* with the analysis in the Crew Case. *Pierre-Louis*, 584 F.3d at 1060, n.9. In affirming the denial of the Rule 60(b) motion, the Court of Appeals again found that the "denial of a motion to dismiss the crew cases *on forum non conveniens* grounds did not make continued application of its dismissal of the passenger cases inequitable." Pet. App. at 4a. Thus, the FNC decisions in both the Passenger and Crew Cases were consistent with the MMTJA because the MMTJA addresses *inconsistencies* of duplicate

litigation—here, there was no duplicate litigation. As the District Court explained in denying Petitioners' motion to intervene in the Crew Case:

> The Passenger Plaintiffs never asserted product-liability claims in this Court, and the Crew Member Plaintiffs never asserted Montreal Convention claims in this Court. And although both cases originated in the Southern District of Florida, only one remains. As discussed below, in 2007, the undersigned dismissed the Passenger Case in favor of the more convenient forum of the French court in Martinique, but when the appropriateness of transfer to the French court in Martinique was litigated a year later in the Crew Member Case, the independent circumstances of that case prevented a similar dismissal.

Opp. Pet. at 4a.

The Courts below have twice determined that the Passenger FNC Order was proper. Thus, no part of those decisions conflicts with the MMTJA.

3. Intervention Is Not Mandatory

While intervention was not asserted as a ground for Rule 60(b) relief (Pet App. at 10a), Petitioners argue that the District Court abused its discretion in failing to vacate the FNC Order because §1369(d) entitled them to mandatory intervention in the Crew Case to re-assert their dismissed Montreal Convention claims. Petition at 17-18. Again, this argument is without merit.

No statute provides for intervention in a civil case outside of the requirements of Fed. R. Civ. P. 24. *See, e.g., Bhd. of R.R. Trainmen v. Baltimore & Ohio R.R. Co.*, 331 U.S. 519, 525-26 (1947) (acknowledging interplay between Rule 24 and statutorily-created right to intervene); *see also Iridium India Telecom Ltd. v. Motorola, Inc.*, 165 Fed. Appx. 878, 879 (2d Cir. 2005). Because repeals by implication are not favored, *United States v. Aguilar*, 515 U.S. 593, 616 (1995), had Congress intended to repeal Rule 24 in this case, it would have explicitly and unambiguously done so. It did not, and thus the right to intervene is interpreted within the confines of Rule 24(a) which allows intervention as of right if "on ***timely*** motion." *See N.A.A.C.P. v. New York*, 413 U.S. 345, 366 (1973).

Petitioners never moved to intervene in the Crew Case to assert their Montreal Convention claims, but shortly before filing their Rule 60(b) motion, Petitioners moved to intervene in the Crew Cases to assert the same product liability claims as those brought by the Crew Members. On January 8, 2010, the District Court denied their motion to intervene. The District Court found that intervention pursuant to §1369(d) was not mandatory and, after considering the timeliness factors for intervention as of right under Rule 24(a), concluded that Petitioners' motion was untimely. *See* Opp. App. at 28a.

Thus, Petitioners' argument that the Passenger FNC Order and the denial of Rule 60(b) relief precluding them from intervening in the Crew Case are "unjust" and "unfair" because of an alleged

disparity in damage awards is baseless. In rejecting a similar argument presented in the motion to intervene, the District Court stated that "if the Bapte Plaintiffs' were so concerned about the application of U.S. law, they ought to have filed their product-liability claims in this jurisdiction three years ago." Opp. App. at 25a, n.25. The Court explained:

> . . . the Bapte Plaintiffs explicitly argue in their Reply that they are now seeking damages under U.S. law as opposed to the one-hundred percent of damages under French law being offered to them in Martinique and notwithstanding that they have product-liability claims that have been pending in the French court for over two years. (D.E.375.) But the Court is not convinced this is a valid purpose for seeking what is essentially a transfer of venue from Martinique.

Opp. App. at 25a. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 247 (1981) (conclusive and substantial weight should *not* be given to whether one forum's substantive law is more favorable to another's in the FNC analysis).

The decisions of the Courts below are correct and do not conflict with the language or purpose of the MMTJA.

III

THE RULE 60(B) DECISION OF THE COURT BELOW DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR THE COURTS OF APPEALS

Petitioners' Rule 60(b) motion relied on Rule 60(b)(5) and (6). Rule 60(b)(5) provides grounds for relief only when a judgment applies "prospectively," and "only when that prospective application is inequitable." *See* 12 James Wm. Moore et al., Moore's Federal Practice §60.47 (3d ed. 2010).[3] Rule 60(b)(6), which sets forth a "catch-all" provision, provides for extraordinary relief and may be invoked only upon a showing of exceptional circumstances. *See Coltec Indus.*, 280 F.3d at 273. The district court has broad discretion in ruling on a Rule 60(b) motion, subject to review only for an abuse of discretion. *See Cano v. Baker*, 435 F.3d 1337, 1342 (11th Cir. 2006); *Toole v. Baxter Healthcare Corp.*, 235 F.3d 1307, 1317 (11th Cir. 2000); *see also Agostini v. Felton*, 521 U.S. 203, 238 (1997). In light of foregoing, the District Court and Court of Appeals did not abuse their discretion and properly denied Rule 60(b) relief.

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[3] Petitioners are not entitled to relief under Rule 60(b)(5) because the Passenger FNC Order does not have prospective application within the meaning of the rule. *See Gibbs v. Maxwell House*, 738 F.2d 1153, 1155-56 (11th Cir. 1984) (fact that plaintiff remains bound by an order is not a prospective effect within the meaning of Rule 60(b)(5)); *Maraziti v. Thorpe*, 52 F.3d 252, 254 (9th Cir. 1995); *see also Coltec Indus., Inc. v. Hobgood*, 280 F.3d 262, 272 (3d Cir. 2002) (dismissal orders generally not prospective).

The Courts below correctly determined that no equitable reason warranted the vacation of the Passenger FNC Order requiring the Petitioners to litigate their claims in Martinique. The Courts recognized that the products liability claims and Montreal Convention claims were materially distinct and, therefore, the lack of intervention in the Crew Case would not result in duplicative litigation. Moreover, the Courts below found that the advantages of the litigation in Martinique (*i.e.*, the presence of WCA, the concession of liability, the waiver of damage caps) better served the interests of Petitioners than the speculative possibility of recovery in the products liability lawsuit. *Pierre Louis*, 584 F.3d at 1060, n.9; Pet. App. at 7a-10a. Indeed, the District Court correctly noted that the Petitioners were entitled to only one recovery—regardless of the theory—and so, where the Petitioners were already receiving 100% of their damages in Martinique, intervention in the crew cases had no real purpose. Pet. App. at 9a.

Nevertheless, in an effort to find a ground for *certiorari*, Petitioners assert that the Court's application of Rule 60(b)(5) and (6) below is in conflict with this Court's decision in *Gondeck v. Pan Am. World Airways, Inc.*, 382 U.S. 25 (1965) and the Tenth Circuit's decision in *Pierce v. Cook & Co.*, 518 F.2d 720 (10th Cir. 1975), which they claim set forth a general rule that individuals injured in the same accident must always be afforded the same relief. Neither *Gondeck* nor *Pierce* supports such a sweeping conclusion.

In *Gondeck*, 382 U.S. 25, which arose out of a motor vehicle accident involving military personnel on San Salvador Island, this Court granted relief based on "'intervening circumstances of substantial * * * effect,'" because: (1) the district court and Fifth Circuit misinterpreted Supreme Court precedent to deny recovery to the wife of an individual killed in the accident; (2) the Fourth Circuit properly reached the opposite conclusion on the relevant issue and granted relief to one of the other victims; (3) the Fifth Circuit itself expressed doubt in a subsequent case as to whether its decision in *Gondeck* was correct; (4) this Court reversed the only decision that stood alongside the Fifth Circuit's opinion in *Gondeck*; and (5) the petitioner was the only victim of the accident not to receive compensation even though the relevant facts and law were identical for each of the victims. *Id.* at 26-28.

In *Pierce v. Cook & Co.*, 518 F.2d 720, the Tenth Circuit granted Rule 60(b)(6) relief to the surviving widow of a man killed in a motor vehicle accident because the federal court in which she was forced to litigate denied her recovery based on established Oklahoma Supreme Court precedent that was subsequently reversed by the Oklahoma Supreme Court in an appeal by another victim of the same accident who litigated the case in state court. *Id.* at 721-22. The Court found that because the plaintiffs were forced to litigate in the federal court, and the results in a federal court sitting in diversity should be the same as those in state court litigation arising out of the same transaction or occurrence, the different results of the state and federal court litigation constituted an

"extraordinary situation" sufficient to warrant relief under Rule 60(b)(6). The court vacated its prior judgment and remanded the case for further proceedings. *Id.* at 723-24.

Relying on *Gondeck* and *Pierce*, Petitioners argue that individuals who are injured in the same accident are solely for that reason entitled to "recover damages commensurate with those recovered by other victims of the same . . . accident." Petitioner at 23. Petitioners' position is wrong and ignores that pursuant to choice of law rules, courts often apply differing liability and damage laws to parties *even in the same litigation*. In any event, neither *Gondeck* nor *Pierce* sets forth such a rule, and unlike in *Gondeck* and *Pierce*, in this case:

- there was no change in the law;
- there is no question that Petitioners will receive compensation in accordance with the applicable damage law;
- the Crew Case and the Passenger Case were before the same court;
- the relevant legal doctrine (FNC) was applied in the same manner (*i.e.*, the same factors were applied) in both the Crew Case and the Passenger Case; and
- the Crew Member plaintiffs and Passenger-Plaintiffs were not similarly situated with regard to the FNC analysis. Their claims involved different theories of law, different defendants,

> different issues and different evidence—in the Passenger Case, liability was not at issue and hundreds of foreign plaintiffs were involved; in the Crew Case, liability and damages were at issue and there were relatively few foreign plaintiffs involved.

The decision of the Court of Appeals does not conflict with the holding or rationale of *Gondeck* or *Pierce*.

CONCLUSION

The Petition fails to set forth any reason for review to be granted—there is no conflict with the language or purpose of the MMTJA, there is no conflict among the Circuits, and there is no conflict with a decision of this Court. For the foregoing reasons, the Petition for a Writ of *Certiorari* should be denied.

Dated: August 2, 2010

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 07-22015-CIV-UNGARO
Consolidated Cases

IN RE: WEST CARIBBEAN AIRWAYS
CREW MEMBERS

ORDER ON MOTION TO INTERVENE

THIS CAUSE is before the Court upon the Motion to Intervene by the Bapte Plaintiffs[1] and Incorporated Memorandum of Law (the "Motion to Intervene") (D.E. 342), filed on August 13, 2009; the Bapte Plaintiffs' Request for Oral Argument (D.E. 345), filed on August 13, 2009; and, the Bapte Plaintiffs' Motion for Clarification (D.E. 395), filed on December 16, 2009.

THE COURT has considered the motions and the pertinent portions of the record and is otherwise fully advised in the premises.

[1] Although not identified in the Motion to Intervene, the Bapte Plaintiffs are identified in Exhibit "1" to the Bapte Plaintiffs' proposed Intervener's Consolidated Complaint for Damages. (D.E. 344-1, Ex. 1.) The Bapte Plaintiffs are too numerous for the Court to list, and so the names included in that Exhibit "1" are incorporated herein by reference. (D.E. 344-1, Ex. 1.)

Background

On August 16, 2005, a McDonnell Douglas MD-82 aircraft (the "Subject Aircraft"), operated by West Carribean Airways, a Colombian airline, en route from Panama to Martinique, crashed in Venezuela. All of the passengers and crew were killed.[2] (D.E. 141, hereinafter "3d Am. Compl," ¶¶ 62, 67–68 & 77–78.) None of the deceased were United States citizens or residents. The "Passengers" were all residents of Martinique.[3] (06-22748, D.E. 152 ¶¶ 7 & 74.) And the "Crew Members" were all Colombian citizens and residents. (3d Am. Compl. ¶¶ 4–10.) In 2006 and 2007, two separate lines of litigation ensued: that regarding the Passengers' deaths (the "Passenger Case") and that regarding the Crew Members' deaths (the "Crew Member Case"). The Passenger Case and the Crew Member Case proceeded independently, with each set of Plaintiffs bringing claims against separate groups of defendants under distinct theories.

In the Passenger Case, the heirs and representatives of numerous deceased passengers (the "Passenger Plaintiffs"), including the Bapte Plaintiffs, filed lawsuits in this Court pursuant to the

[2] The factual allegations of the Third Amended Complaint do not differ in any relevant respect from those of the Bapte Plaintiffs' proposed Intervener's Consolidated Complaint for Damages. (D.E. 344-1.) In fact, the proposed Intervener's Consolidated Complaint for damages is predominantly a cut-and-paste of the Third Amended Complaint.

[3] All but one of the Passengers were French nationals; the remaining Passenger was an Italian national. (06-22748, D.E. 159.)

Convention for the Unification of Certain Rules Relating to International Transportation by Air, concluded at Montreal, Canada on May 28, 1999 (the "Montreal Convention")[4] against Newvac Corporation ("Newvac"), Go 2 Galaxy, Inc. ("Go 2 Galaxy"), and West Carribean Airways ("West Carribean") (collectively, the "Carrier Defendants").[5] (06-22748, D.E. 43-1.) Contrastingly, in the Crew Member Case, the heirs and representatives of the estates of the Crew Members (the "Crew Member Plaintiffs") filed lawsuits in this Court under theories of negligence, willful misconduct, and strict liability against numerous "U.S. Defendants"[6] which were involved in the man-

[4] The Montreal Convention exclusively governs the rights and liabilities of passengers and carriers in international air transportation. *See El Al Israel Airlines, Ltd. v. Tsui Yuang Tseng*, 525 U.S. 155, 161 (1999). Accordingly, because the Carrier Defendants qualified as "carriers," the Montreal Convention exclusively governed their liability to the Passengers.

[5] These lawsuits were consolidated into a single case, *In re West Carribean Airways, et al.*, Case No. 06-22748-Civ-Ungaro. (06-22748, D.E. 43-1.)

[6] Newvac is the only Carrier Defendant from the Passenger Case included as a U.S. Defendant in the Crew Member Case; the remaining U.S. Defendants are: The Boeing Company ("Boeing") and United Technologies Corporation ("United Technologies") which manufactured and supplied the Subject Aircraft and its engines, respectively; Pratt & Whitney Engine Services, Inc. ("Pratt Engine") and Pratt & Whitney Canada Corporation ("Pratt Canada")—a Canadian entity and the only non-domestic U.S. Defendant—which supplied replacement parts and repair services for the Subject Aircraft's engines; Honeywell International, Inc. ("Honeywell") which provided avionics and replacement parts for the Subject Aircraft and its engines; Pacific Harbor Capital,

ufacture, maintenance, repair, ownership, and operation of the Subject Aircraft prior to the crash.[7] (3d Am. Compl. ¶¶ 11-21, 79–178.)

The Passenger Plaintiffs never asserted product-liability claims in this Court, and the Crew Member Plaintiffs never asserted Montreal Convention claims in this Court. And although both cases originated in the Southern District of Florida, only one remains. As discussed below, in 2007, the undersigned dismissed the Passenger Case in favor of the more convenient forum of the French court in Martinique, but when the appropriateness of transfer to the French court in Martinique was litigated a year later in the Crew Member Case, the independent circumstances of that case prevented a similar dismissal.

Inc. ("PHC") which, from 1986 through January 5, 2005, owned the Subject Aircraft; Continental Airlines, Inc. ("Continental") which leased the Subject Aircraft from PHC during the same time and was responsible for its maintenance, repair, airworthiness; MK Aviation USA, Inc. ("MK Aviation") which purchased the Subject Aircraft, on January 5, 2005; and, MK Leasing USA ("MK Leasing") which leased the Subject Aircraft to West Carribean in July 2005. (3d Am. Compl. ¶¶ 11–24, 48 & 52.) All of the U.S. Defendants, save for MK Aviation and MK Leasing, remain in the Crew Member Case.

[7] These lawsuits were also consolidated into a single case, *i.e.*, the instant case, *In re West Carribean Crew Members*, Case No. 07-22015-Civ-Ungaro. (D.E. 23.)

2007: *Forum Non Conveniens* Litigation in the Passenger Case

In March of 2007, the Carrier Defendants moved for a *forum non conveniens* dismissal of the Passenger Case in favor of the French court in Martinique. (06-22748, D.E. 54.) The Passenger Plaintiffs opposed the Motions arguing primarily that: the Montreal Convention preempted the *forum non conveniens* analysis and that the public and private interest factors weighed in favor of this forum because the Carrier Defendants would likely pursue third-party, product-liability contribution claims against the U.S. Defendants. (06-22748, D.E. 170.) Importantly, in their opposition, the Passenger Plaintiffs, including the Bapte Plaintiffs, acknowledged the pending product-liability claims in the Crew Member Case, but represented they did not intend to pursue their own product-liability claims in this Court.[8] (06-22748, D.E. 170, pp. 10 – 12.) Instead, before the Court ruled on the *forum non conveniens* motions, the Bapte Plaintiffs initiated product-liability lawsuits in Martinique against several U.S. Defendants, including Boeing, Pratt & Whitney, United Technologies, and Newvac, which remain pending.[9] (06-22748, D.E. 170,

[8] Further, neither the Bapte Plaintiffs, nor any other Passenger Plaintiffs, argued that 28 U.S.C. § 1369 required that all litigation involving the subject accident be resolved in this forum, which the Bapte Plaintiff now belatedly argue in their Motion to Intervene.

[9] Sometime prior to August 2009, the Bapte Plaintiffs moved the French court in Martinique to decline to exercise jurisdiction over their pending claims, including the Montreal Convention claims, but the French court rejected this

p. 10; D.E. 342, p. 8, 359-1 & 366.) Thus, importantly when the Court had the *forum non conveniens* motion in the Passenger Case under consideration, the Bapte Plaintiffs had not asserted any product-liability claims in this Court, represented that they had no intention of doing so, and, in fact, had initiated product-liability claims in Martinique. (06-22748, D.E. 170, pp. 10 – 12.)

On November 13, 2007, this Court granted the motions finding that all of the relevant factors weighed in favor of *forum non conveniens* dismissal. (06-22748, D.E. 184) (granting *forum non* dismissal); *In re West Carribean Airways, S.A.*, 619 F. Supp. 2d 1299 (S.D. Fla. 2007) (holding the doctrine of *forum non conveniens* applies to actions under the Montreal Convention); *see generally Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981). First, Martinique was an adequate and available alternative forum because the Carrier Defendants conceded liability, waived jurisdictional objections, waived statute of limitations objections, and waived damage caps under the Montreal Convention in the French court. (06-22748, D.E. 184, pp. 6 – 8.) Second, the private interest factors favored Martinique because all of the Passengers were residents of Martinique and none were United States citizens or residents and, given that only damages would be at issue in the French court, the relevant evidence was more readily available in Martinique.[10] (06-22748, D.E. 184, pp.

maneuver, on or around August 31, 2009. (D.E. 366, pp. 13–19.)

[10] Critically, because the Passenger Plaintiffs stated they had no intention of bringing product-liability claims in this Court, the availability of product-liability evidence in

8–12.) Third, the public interest factors favored Martinique because of Martinique's superior interest in redressing the injuries to its residents. (06-22748, D.E. 184, pp. 12–14.) Finally, there was no question the Passenger Plaintiffs would be able to prosecute their suits in Martinique because the Passengers were from Martinique and the Carrier Defendants stipulated to the jurisdiction of the French court and otherwise to the Passenger Plaintiffs' ability to reinstate their claims. (06-22748, D.E. 184, pp. 14–15.) The United States Court of Appeals for the Eleventh Circuit affirmed the dismissal on October 8, 2009.[11] *Pierre-Louis v. Newvac Corp.*, 584 F.3d 1052 (11th Cir. 2009).

The Bapte Plaintiffs made no effort to intervene in the Crew Member Case or otherwise assert claims in the U.S. By all accounts, the Passenger Case has successfully proceeded in Martinique. In those proceedings, as stipulated, the Carrier Defendants, including Newvac and West Caribean have conceded liability and waived the Montreal Convention damages caps, leaving only the calculation of damages at issue. (D.E. 368, pp. 12–36.) Numerous Passenger Plaintiffs already have been awarded damages. (D.E. 374.)

Martinique was not a significant factor. (06-22748, D.E. 184, pp. 8–12.)

[11] The Bapte Plaintiffs have apparently petitioned the Court of Appeals for review *en banc*.

2008: *Forum Non Conveniens* Litigation in the Crew Member Case

On January 25, 2008, several months after the *forum non conveniens* dismissal in the Passenger Case, the U.S. Defendants moved to dismiss or transfer the Crew Member Case to the French court in Martinique. (D.E. 76 – 80.) The Crew Member Plaintiffs opposed the Motion, primarily arguing that the French court in Martinique was not an available forum for a product-liability litigation between Colombian nationals or residents and the U.S. Defendants. (D.E. 155.) On September 30, 2008, this Court denied the motions seeking a *forum non conveniens* dismissal or transfer to Martinique; the undersigned was unable to find that the French court in Martinique, a European Union court, was an available alternative forum because the Crew Members, unlike the Passengers, were not French nationals or residents of Martinique and no other sufficient connection to Martinique was present in this case.[12] (D.E. 224.) The Bapte Plaintiffs made no effort, at that time, to intervene in the Crew Member Case.

Thereafter, on October 16, 2008, the U.S. Defendants moved to dismiss or transfer the Crew Member Case to Colombia.[13] (D.E. 244 – 252.) On May

[12] The resolution of this issue required the analysis of expert testimony and other evidence regarding the state and interrelationship of French and European Union law. (D.E. 224.)

[13] To be sure, the issue of Colombia as an alternative forum was previously raised in June 2008 by several U.S. Defendants. (D.E. 178.)

14, 2009, the Court denied the motions seeking dismissal or transfer to Colombia. (D.E. 321.) Although the undersigned concluded that the Colombian courts were available fora, the remaining factors did not weigh in favor of *forum non conveniens* dismissal to Colombia. *See generally Piper Aircraft Co.*, 454 U.S. 235. The undersigned concluded that the private and public interest factors, unlike in the Passenger case, weighed in favor of this forum, particularly given the presence of virtually all liability evidence in the U.S. and the relatively few foreign plaintiffs involved.[14] (D.E. 321.)

2009: the Bapte Plaintiffs Move to Intervene in the Crew Member Case

After years of procedural litigation regarding the proper forum and other similar matters, the Crew Member Case is in discovery and set for trial within the year. (D.E. 363.) However, on August 13, 2009—four years after the crash, two and a half years after filing their Montreal Convention Claim, two years after the filing of the Crew Member Case, two years after the transfer of the Passenger Case to Martinique, at least two years since the initiation of their product liability claims against the U.S. Defendants in Martinique, one year after the denial of the first *forum non conveniens* order in the Crew Member Case, and months after the denial of the second—and despite

[14] Contrastingly, in the Passenger Case dismissed a year earlier, liability was not at issue and hundreds of foreign plaintiffs were involved.

their actions and representations throughout the previous years of litigation, the Bapte Plaintiffs filed the pending Motion to Intervene. All of the existing parties to the Crew Member Case oppose the intervention.

Discussion

The Bapte Plaintiffs move to intervene as of right pursuant to Federal Rule of Civil Procedure ("Rule") 24(a)(1) and 28 U.S.C. § 1369(d) and to join the Crew Member Case as Plaintiffs against U.S. Defendants Boeing, Pratt Engine, United Technologies, and Newvac, but not against the remaining U.S. Defendants. (D.E. 342.) The Bapte Plaintiffs argue that § 1369(d) provides them an unconditional and independent right to intervene and, in the alternative, that they are entitled to intervene pursuant to Rule 24(a)(1). However, § 1369(d) does not create a right to intervene outside of Rule 24, and the Bapte Plaintiffs' Motion to Intervene does not satisfy the requirements of Rule 24(a)(1).

I

The Bapte Plaintiffs argue that they may intervene without satisfying the requirements of Rule 24 because "intervention under § 1369(d) is mandatory given the legislative intent." (D.E. 342, p. 14.) The Court does not agree that the language of the statute entitles the Bapte Plaintiffs to ignore the requirements of Rule 24, and the Bapte Plaintiffs do not cite nor has this Court discovered a single case of record holding otherwise.

The Multiparty, Multiforum Jurisdiction Trial Jurisdiction Act of 2002, 28 U.S.C. § 1369, expanded the subject matter jurisdiction of the United States district courts to include litigation involving certain catastrophic accidents. Section 1369(a) states:

> **In general.**—The district courts shall have original jurisdiction of any civil action involving minimal diversity between adverse parties that arises from a single accident, where at least 75 natural persons have died in the accident at a discrete location, if—
>
> > **(1)** a defendant resides in a State and a substantial part of the accident took place in another State or other location, regardless of whether that defendant is also a resident of the State where a substantial part of the accident took place;
> >
> > **(2)** any two defendants reside in different States, regardless of whether such defendants are also residents of the same State or States; or
> >
> > **(3)** substantial parts of the accident took place in different States.

Section 1369(d) concerns intervention and states:

> **Intervening parties.**—In any action in a district court which is or could have been brought, in whole or in part, under this section, any person with a claim arising from the accident described in subsection

> (a) shall be permitted to intervene as a party plaintiff in the action, even if that person could not have brought an action in a district court as an original matter.

The Bapte Plaintiffs argue that the inclusion of the word "shall" requires that this Court interpret subsection (d) as creating a mechanism for intervention independent of Rule 24.

However, the undersigned does not agree that § 1369(d) supersedes Rule 24. Although "a statute passed after the effective date of a federal rule repeals the rule to the extent that it actually conflicts," *Mitchell v. Farcass*, 112 F.3d 1483, 89 (11th Cir. 1997), "repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal is clear and manifest," *Nat'l Assoc. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007) (quotations omitted). "We will not infer a statutory repeal "unless the later statute expressly contradicts the original act or unless such a construction is absolutely necessary in order that the words of the later statute shall have any meaning at all." *Id.* (quotations omitted). It is "a cardinal principle of statutory construction that repeals by implication are not favored." *U.S. v. Aguilar*, 515 U.S. 593, 616 (1995). Here, an intention to repeal Rule 24 is not clear and manifest.

First, § 1369(d) does not explicitly mention or reference Rule 24. Consistent with the well established principles of statutory interpretation, Congress is presumed to be aware of the relevant legal context when drafting legislation. *See Lane v. Pena*, 518 U.S. 187, 202 (1996); *Canon v. Univ.*

of Chicago, 441 U.S. 677, 696 – 97 (1946). And the relevant legal context with respect to intervention in the federal courts is that: "Intervention in a federal court is governed by Fed. Rule Civ. P. 24." *N.A.A.C.P. v. New York*, 413 U.S. 345, 365 (1973); *Georgia v. Ashcroft*, 539 U.S. 461, 476 (2003). In fact, the Bapte Plaintiffs have not cited and this Court is not aware of any other statute providing for intervention in a civil case outside of Rule 24. Accordingly, an explicit and unambiguous repeal of Rule 24 would be expected if that were Congress's intent.

Second, § 1369(d) is easily read in harmony with Rule 24 which clearly contemplates the existence of "unconditional right[s] to intervene" by federal statute. Rule 24(a) states:

> **Intervention as of Right.** On timely motion, the court must permit anyone to intervene who:
>
> (1) is given an unconditional right to intervene by federal statute; or . . . Indeed, other strongly worded statutes, have been applied by way of Rule 24(a)(1). *See, e.g.*, *Ruiz v. Estelle*, 161 F.3d 814, 816–21 (5th Cir. 1998) (applying statute which stated local and state officials "shall have the right to intervene in any preceding relating" to certain claims under the Prison Litigation Reform Act by way of Rule 24(a)(1)). The Bapte Plaintiffs argue the inclusion of the word "shall," as opposed to "may," in the phrase "shall be permitted" requires that § 1369(d) be read to conflict with Rule 24. However, the Court disagrees; the phrase "shall be permitted" is no

more forceful than "shall have the right" the latter of which has been held to operate only by way of Rule 24(a)(1). *See id.* The stronger language simply serves to create an "*unconditional*" right to intervene as required by Rule 24, which otherwise would not automatically be the case. *See* C. Wright, A. Miller, & M. Kane, 7C Fed. Prac.& Proc. Civ. § 1906 (3d ed. 2009) ("[T]he courts have been hesitant to find an unconditional statutory right of intervention."). Thus, § 1369(d) does not create a separate, independent right to intervene, and the Bapte Plaintiffs Motion to Intervene must satisfy the requirements of Rule 24.

II

The Bapte Plaintiffs' Motion to Intervene does not satisfy the requirements of Rule 24 because it is untimely. A motion to intervene pursuant to Rule 24(a)(1) must be timely.[15] "Timeliness is to be

[15]

> Whether intervention is claimed as of right or as permissive, it is at once apparent from the initial words of both Rule 24(a) and Rule 24(b), that the application must be "timely." If it is untimely, intervention must be denied. Thus, the court where the action is pending must first be satisfied as to timeliness.

N.A.A.C.P. v. New York, 413 U.S. at 365. The timeliness analysis is identical under both Rule 24(a) and Rule 24(b). *See id.* at 348 n. 3; *Stallworth v. Monsanto Co.*, 558 F.2d 257, 263 (5th Cir. 1977) ("Whenever leave to intervene is sought under section (a) or section (b) of Rule 24, the application must be timely."). Although some courts have artic-

determined from all the circumstances[, a]nd it is to be determined by the court in the exercise of its sound discretion; unless that discretion is abused, the court's ruling will not be disturbed on review." *N.A.A.C.P. v. New York*, 413 U.S. at 365–66 (citations omitted); *see also Stallworth*, 558 F.2d at 263 ("[T]imeliness is not limited to chronological considerations but is to be determined from all the circumstances.") (citations omitted). The factors courts consider in evaluating timeliness include:

> (1) the length of time during which the would-be intervenor knew or reasonably should have known of his interest in the case before he petitioned for leave to intervene; (2) the extent of prejudice to the existing parties as a result of the would-be intervenor's failure to apply as soon as he knew or reasonably should have known of his interest; (3) the extent of prejudice to the would-be intervenor if his petition is denied; and (4) the existence of unusual circumstances militating either for or against a determination that the application is timely.

United States v. Jefferson County, 720 F.2d 1511, 1516 (11th Cir. 1983); *accord N.A.A.C.P. v. New York*, 413 U.S. at 366. Application of the factors to

ulated a separate rule that a "district court should apply a more lenient standard of timeliness if the would-be intervenor qualifies for intervention under section (a) than if he qualifies for intervention under (b)," this concept is incorporated into any timeliness analysis which considers prejudice to the would-be intervenor if the intervention is denied. *See id.* at 265–66.

this case demonstrates that the Motion to Intervene is untimely.

First, the Motion to Intervene is unseasonable because the Bapte Plaintiffs were aware of the Crew Member Case for at least two years prior. Second, because of this delay, allowing the intervention would require the litigation of complex procedural issues which would prolong the Crew Member Case and prejudice the existing parties. Third, and most importantly, the Bapte Plaintiffs will suffer absolutely no prejudice if the Motion to Intervene is denied because their interests are adequately protected in this Court and, in any event, they are currently able to pursue their remedies in Martinique. And fourth, the unusual circumstances of this case, including the currently pending cases in Martinique, strongly weigh against intervention.

A

The Bapte Plaintiffs' Motion to Intervene is unseasonable. The Bapte Plaintiffs knew of Crew Member Case two years ago as stated in their opposition to the *forum non conveniens* motion in the Passenger Case and obviously knew of their product-liability claims against several of the U.S. Defendants, including Boeing, Pratt & Whitney, United Technologies, and Newvac, since they initiated these very claims in the French court in Martinique. Nonetheless, the Bapte Plaintiffs argue their motion is timely because it "comes shortly after the Court's May 13, 2009 [Order denying dismissal for *forum non conveniens*] the effect of which was to significantly alter the land-

scape of the litigations arising out of the crash of WCA flight 708" and "prior to the same, the Court's rulings were that these Plaintiffs would have to seek remedy in France." (D.E. 342, p. 17.) This argument is unconvincing; the Bapte Plaintiffs asserted their product-liability claims in Martinique before this Court granted the *forum non conveniens* motions in the Passenger Case. Moreover, the landscape of the litigation was not altered by this Court's Order denying dismissal for *forum non conveniens* in the Crew Member Case.[16] This Court has always been the venue for the Crew Member Case; has never ruled that the Crew Member Plaintiffs must seek remedy in France; and, in fact, had previously denied a motion to dismiss for *forum non conveniens* in the Crew Member Case. Accordingly, the two-year delay weighs against intervention. *See, e.g., In re Bank of N.Y. Derivative Litig.*, 173 F. Supp. 2d 193, 201 (S.D.N.Y. 2001) (denying motion to intervene as untimely where motion was filed after suit had been pending for two years).

[16] The Court did not, as the Bapte Plaintiffs argue, in its May 2009 order denying *forum non conveniens* dismissal in the Crew Member Case "consider itself the most convenient forum to adjudicate the product liability and negligence claims of foreign plaintiffs." (D.E. 342) The Court decided only the issue before it, *i.e.*, that it was a more convenient forum for the claims of the Crew Member Plaintiffs than was Colombia. (D.E. 321)

B

Granting the Motion to Intervene will prejudice the existing parties.[17] "The inquiry for this factor is whether other parties were prejudiced by the *delay*, not whether they would be prejudiced by *the addition of the claim*." *Effjohn Int'l Cruise Holdings, Inc. v. A & L Sales, Inc.*, 346 F.3d 552, 561 (5th Cir. 2003) (emphasis in original). Because of the two-year delay, allowing intervention will now result in complex and consuming procedural litigation which will significantly prolong the Crew Member Case and thereby prejudice the existing parties. *See, e.g.*, *MasterCard Int'l Inc. v. Visa Intern Serv. Int'l Inc.*, 471 F.3d 377, 390 (2d Cir. 2006) (holding postponed resolution would prejudice existing parties); *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 69 (2d Cir. 1994) ("Intervention is a procedural device that attempts to accommodate two competing policies: efficiently administering legal disputes by resolving all related issues in one lawsuit, on the one hand, and keeping a single lawsuit from becoming unnecessarily complex, unwieldy or prolonged, on the other hand.") (citing *U.S. v. Tex. E. Transmission Corp.*, 923 F.2d 410, 412 (5th Cir. 1991)); *Hollywood Cmty. Synagogue, Inc.*, 254 Fed. Appx. 769, 771 (11th Cir. 2007) (affirming denial of intervention as untimely where existing parties would be prejudiced by "practically undoing twenty-two months of litigation").

[17] Importantly, even without prejudice to the existing parties, the Court would, in its discretion, deny the Motion to Intervene as untimely based upon the remaining three factors.

First, during the delay, the existing parties extensively litigated the issue of *forum non conveniens*, and to allow the intervention now would almost certainly require re-litigation of the issue. As explained above, transfer of the Crew Member Case to Martinique was previously denied because the French court's jurisdiction in the absence of any significant connection to Martinique was doubtful. However, the analysis would be different if the Bapte Plaintiffs intervened because the Passengers, unlike the Crew Members, were French citizens or residents of Martinique. Re-litigating this issue would prejudice the existing parties with further and significant procedural delay, regardless of the outcome. And if the Crew Member Case was ultimately transferred to Martinique, the existing parties would suffer even greater prejudice in the form of further delay and wasted costs and efforts in this Court.[18] *See, e.g.*, *MasterCard*, 471 F.3d at 390.

Second, during the delay, Florida's limitations period lapsed, and to allow the intervention now will require litigation regarding the impact of this lapse on the Bapte Plaintiffs' claims. Florida

[18] The Bapte Plaintiffs have not cited nor has the Court discovered any case which supports the contention that a *forum non conveniens* analysis would be foreclosed if intervention was allowed. As the Crew Member Plaintiffs point out in their opposition, actions removed to federal court from state court pursuant to § 1369, for instance, are clearly subject to *forum non conveniens* analysis. *See* 28 U.S.C. § 1441(e)(5) & (6). And in their oppositions, several of the U.S. Defendants indicate they will pursue dismissal for *forum non conveniens* if the Bapte Plaintiffs intervene. (D.E. 352, p.9.)

imposes a two-year statute of limitations for wrongful death actions. *See* Fla. Stat. § 95.11(4)(d); *Saxton v. ACF Indus., Inc.*, 254 F.3d 959, 961 (11th Cir. 2001) (holding a federal district court sitting in diversity applies the statute of limitations rules of the forum state). Thus, whether Florida's statute of limitations applies and whether the Bapte Plaintiffs' Complaint in Intervention relates back would be critical and contentious issues.[19] Again, regardless of the outcome, litigation of this issue would prejudice the existing parties with further and significant procedural delay. *See, e.g.*, *MasterCard*, 471 F.3d at 390.

Third, during the delay, the existing parties agreed that foreign (non-U.S.) law did not apply to the Crew Member Case, and allowing the intervention likely would reopen this issue.[20] Litigation

[19] In their Reply, the Bapte Plaintiffs argue that their Complaint in Intervention would relate back, obviating any statute of limitations issues. (D.E. 375.) This is not clearly the case; the application of the doctrine of relation-back to complaints in intervention under Rule 24 is far from settled among the federal courts. *See generally, e.g.*, *Cachil Dehe Band of Wintun Indians of Colusa Indian Comty. v. California*, 929 F. Supp. 2d 1091, 1102 – 05 (E.D. Cal. 2009). And as explained above, the point as far as the instant analysis is concerned is the prejudice which will be caused by the litigation of this issue itself—which, but for the Bapte Plaintiffs' two-year delay, would not otherwise be necessary. And the same is true of the Bapte Plaintiffs' equitable tolling arguments.

[20] On May 15, 2009, the Court ordered any existing party intending to rely on foreign law to comply with Fed. R. Civ. P. 44.1 within 60 days; no party indicated an intent to rely on foreign law. (D.E. 324) The Bapte Plaintiffs assert

of choice of law issues is usually a complex exercise,[21] and, in this case, the outcome of the choice of law litigation would be critical to the resolution of the Bapte Plaintiffs' claims. Among other issues, choice of law will affect the measure of damages, the applicable statute of limitations, and standing to bring wrongful death actions.[22] Thus, the issue of the application of foreign law would

they will agree to be bound by all prior orders of the Court in an effort to alleviate prejudice to the existing parties. (D.E. 375, p.3.) Convenient as it may be for the Bapte Plaintiffs to join this litigation *as is* now that it has taken a turn they deem favorable, the Court is not convinced the existing parties, in particular the U.S. Defendants, would not seek to re-open these issues. Indeed, the U.S. Defendants would likely argue that French law should govern the Bapte Plaintiffs' damages claims if intervention were allowed.

[21] "In determining which law applies, a federal district court sitting in diversity must apply the choice of law rules of the forum state." *Rando v. Gov't Empl. Ins. Co.*, 556 F.3d 1173, 1176 (11th Cir. 2009). With respect to tort claims, Florida applies the most significant relationships test in analyzing choice-of-law issues, *see, e.g., Proprietors Ins. Co. v. Valsecchi*, 435 So.2d 290, 294 (Fla. 3d DCA 1983), and, under Florida law, different issues might be governed by different substantive law; for instance, the issues of liability and damages might be governed by the laws of different jurisdictions. *See Foster v. U.S.*, 768 F.2d 1278, 1281 (11th Cir. 1985); *Stallworth v. Hospitality Rentals, Inc.*, 515 So. 2d 413, 415 (Fla. 1st DCA 1987).

[22] Under Fla. Stat. § 95.10 and the Florida Supreme Court's decision in *Merkle v. Robinson*, 737 So. 2d 540 (Fla. 1999), if a foreign jurisdiction is found to have the most significant relationship to a litigation then that foreign jurisdictions' statute of limitation applies. Florida's Wrongful Death Act creates a cause of action only for certain "survivors" of a decedent. *See* Fla. Stat. § 768.16 *et seq.*

almost certainly be revisited with respect to the Bapte Plaintiffs, and the existing parties would be prejudiced, not only because of the consequent delay, but also because the belated injection of foreign-law issues would require the existing parties to revisit their current trial and discovery strategies in which they have invested significant time and effort.

C

Denying the Motion to Intervene will not prejudice the Bapte Plaintiffs. The Bapte Plaintiffs argue that a judgment relieving the U.S. Defendants from product-liability in this case would prohibit the Bapte Plaintiffs from enforcing, in the United States, a separate judgment from Martinique holding the U.S. Defendants liable. (D.E. 342, p. 2.) However, this argument, even if legally sound, does not support the conclusion that the Bapte Plaintiffs will be prejudiced without intervention:

> The thrust of the inquiry must be the extent to which a final judgment in the case may bind the movant even though he is not adequately represented by an existing party. We note that this third factor thus has weight only in the situation where (a) the judge cannot anticipate the extent to which the a final judgment will bind a movant, or (b) the judge finds that although the movant has an identical interest with a party, he has sufficiently greater stakes than the party that the party's representation may be inadequate

> to protect the movant's interest. Otherwise, where the movant has no identity of interest with a party and thus could not be bound, or where his interest is identical with a party and consequently he is adequately represented, we would find no prejudice sufficient to give weight to the third factor.

Jefferson County, 720 F.2d at 1517.

First and foremost, the Bapte Plaintiffs' interest in establishing the liability of the U.S. Defendants is adequately protected in this Court by the Crew Member Plaintiffs and their experienced counsel. The Bapte Plaintiffs do not have a significantly greater stake than the Crew Member Plaintiffs in establishing the liability of the U.S. Defendants, and a liability judgment against the U.S. Defendants is no less likely without intervention. *Jefferson County*, 720 F.2d at 1517. Accordingly, regardless of their stated interest in a liability judgment against the U.S. Defendants in this Court, the Bapte Plaintiffs will not be prejudiced if intervention is denied.

Second and alternatively, a judgment relieving the U.S. Defendants from liability in this case would not materially impact the Bapte Plaintiffs, in any event. Currently, the Bapte Plaintiffs are poised to collect one hundred percent of their damages under the Montreal Convention in Martinique.[21] Notably, the Bapte Plaintiffs have not

[21] As explained above, in Martinique, the Carrier Defendants have waived damage caps and are not contesting liability under the Montreal Convention, and the Passenger Plaintiffs need proceed only on the issue of damages.

argued, and the Court fails to perceive how, they would be entitled to a double-recovery—once in Martinique under the Montreal Convention and a second time under product-liability theories either in Martinique or in this case.[24] Thus, even assuming a judgment relieving the U.S. Defendants from liability in this case would somehow prohibit the Bapte Plaintiffs from enforcing a liability judgment from Martinique, the effect would be of little significance. *Cf. Fox*, 579 F.3d at 1304 (denying motion to intervene as of right and noting that potential effect of adverse ruling was insufficient to necessitate intervention) (citing *ManaSota-88 v. Tidwell*, 896 F.2d 1318, 1323 (11th Cir. 1990) ("[A] potential stare decisis effect does not automatically supply the practical disadvantage warranting intervention.")); *Campbell v. Hall Mark Elec. Corp.*, 808 F.2d 775, 779 (11th Cir. 1987) (noting prejudice to potential intervenor was minimal where damages were available with or without intervention). Thus, denying the Motion to Intervene will not prejudice the Bapte Plaintiffs.

[24] This is likely why, of all the Passenger Plaintiffs, only the Bapte Plaintiffs are pursuing intervention in this Case. In their Reply, the Bapte Plaintiffs argue they may get greater damages under U.S. law (D.E. 375), but do not argue why French law would not govern their damages even if they intervened in the Crew Member Case. *See, e.g., Foster v. U.S.*, 768 F.2d 1278, 1281 (11th Cir. 1985) ("[D]ifferent substantive issues in a single case may have to be resolved under the laws of different states where the choices influencing the decisions differ."), *Stallworth v. Hospitality Rentals, Inc.*, 515 So. 2d 413, 415 (Fla. 1st DCA 1987) (same).

D

The unusual circumstances of this case weigh against intervention. "[I]ntervention may be sought in a wide variety of situations involving unique facts and procedural postures." *Tex. E. Transmission Corp.*, 923 F.2d at 412. "Because Rule 24 attempts to address all of these situations, the facts and procedural posture of each case are important, and it is often true that 'general rules and past decisions cannot provide uniformly dependable guidelines.'" *Id.* (citations omitted). Here, several unusual circumstances weigh against intervention.

First and foremost, the Motion to Intervene strongly hints of forum shopping; in fact, the Bapte Plaintiffs explicitly argue in their Reply that they are now seeking damages under U.S. law as opposed to the one-hundred percent of damages under French law being offered to them in Martinique and notwithstanding that they have product-liability claims that have been pending in the French court for over two years. (D.E. 375.) But the Court is not convinced this is a valid purpose for seeking what is essentially a transfer of venue from Martinique.[25] *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 256 (1981) (holding, in the context of an airline-crash litigation, that conclusive and substantial weight should not be given to whether one forum's substantive law is more favorable to another's in the *forum non conveniens*

[25] Moreover, if the Bapte Plaintiffs' were so concerned about the application of U.S. law, they ought to have filed their product-liability claims in this jurisdiction three years ago.

analysis). "In such circumstances, a plausible likelihood exists that the selection was made for forum-shopping reasons, such as the perception that United States courts award higher damages than are common in other countries." *Iragorri v. United Tech. Corp.*, 274 F.3d 65, 71 (2d Cir. 2001) (discussing *forum non conveniens* analysis where a foreign plaintiff chooses a U.S. forum) (quoting *Piper Aircraft*, 454 U.S. at 256). Additionally, rather than reducing the risk of inconsistent judgments, intervention would raise international comity concerns because the French court in Martinique has already rejected the Bapte Plaintiffs' attempt to transfer to this Court the claims against several of the U.S. Defendants pending in Martinique, and whether the French court would continue to exercise concurrent jurisdiction over those claims is unclear. *See generally, e.g.*, *Belize Telecom, Ltd. v. Gov't of Belize*, 528 F.3d 1298, 1305 (11th Cir. 2008) (describing the circumstances when federal courts should abstain from the exercise of jurisdiction of private international disputes under the principal of international comity).[26]

Second, the Motion to Intervene is essentially an attack on this Court's previous *forum non conveniens* rulings.[27] Nothing prevented the Bapte

[26] Similarly, the Bapte Plaintiffs' arguments regarding the purpose of § 1369(d) is unavailing because a second litigation arising from the crash will exist in Martinique under the Montreal Convention regardless of the intervention.

[27] This is consistent with the Bapte Plaintiffs' choice to file the Motion to Intervene concurrently with their Motion for Rule 60(b) Relief in the Passenger Case—two years late.

Plaintiffs from asserting product-liability claims against the U.S. Defendants in the Passenger Case, the existence of which would have been considered in the Passenger Case *forum non conveniens* analysis. And similarly, nothing prevented the Bapte Plaintiffs from moving to intervene prior to the extensive *forum non conveniens* litigation in this case. Instead, the Bapte Plaintiffs' now argue that they are effectively entitled both to a do-over of their *forum non conveniens* litigation in the Passenger Case and to circumvent the *forum non conveniens* litigation in the Crew Member Case by way of a late-in-the-game intervention. However, the Bapte Plaintiffs are not so entitled.

> A party's strategic decisions for litigation are, to a great extent, based on conjectures about what future course will be most favorable to the party; with hindsight, some of the conjectures turn out to be incorrect. But to hold litigants to their strategic decisions on how broadly or narrowly they wish to litigate is not unfair.

Shahar v. Bowers, 120 F.3d 211, 213 (11th Cir. 1997).

Third, intervention would put an undue burden on the existing parties, the Court, and the citizens comprising the jury.[28] *See Fox v. Tyson Foods, Inc.*, 579 F.3d 1298, 1304 (11th Cir. 2008) (noting that defendant "would need at least an additional year

[28] There are roughly 900 Passenger Plaintiffs, and the Bapte Plaintiffs comprise several hundred of them. (D.E. 344-1, Ex. 1.)

to depose the 161 petitioners" in affirming denial of permissive intervention); *Cf. Piper Aircraft*, 454 U.S. at 243–44, (upholding dismissal for *forum non conveniens* where "it would be unfair to burden the citizens with jury duty when the Middle District of Pennsylvania has little connection with the controversy").

Finally, after years of litigation in both the Passenger and Crew Member Cases, the Bapte Plaintiffs' recent attempts at reversing the course of their litigation are highly irregular, when viewed from the ground-level and in the totality of the circumstances. While the Bapte Plaintiffs themselves sit, uncompensated for their losses despite the damage awards *awaiting* them in Martinique, counsel for the Bapte Plaintiffs seem intent on engaging in last-minute procedural maneuvering with no clear relation to their clients' interests.

Conclusion

In sum, the Bapte Plaintiffs now seek to undo strategic decisions they made years ago. Their motives are highly questionable, and none of the relevant factors weighs in favor of intervention. Indeed, the Bapte Plaintiffs have not cited and the Court has not discovered a single case of record supporting intervention under similar circumstances. Thus, the Court, in its discretion, denies the Motion to Intervene as untimely.

Accordingly, it is

ORDERED AND ADJUDGED that the Motion to Intervene (D.E. 342) is DENIED. It is further

ORDERED AND ADJUDGED that the Motion for Oral argument (D.E. 345) is DENIED AS MOOT. It is further

ORDERED AND ADJUDGED that the Motion for Clarification (D.E. 395) is DENIED AS MOOT.

DONE AND ORDERED in Chambers at Miami, Florida, this 8th day of January, 2010.

/s/ URSULA UNGARO
URSULA UNGARO
UNITED STATES DISTRICT JUDGE

copies provided: counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 07-22015-CIV-UNGARO
Consolidated Cases

IN RE: WEST CARIBBEAN AIRWAYS
CREW MEMBERS

ORDER OF DISMISSAL

THIS CAUSE is before the Court *sua sponte*.

THE COURT has reviewed the record and is otherwise fully advised in the premises. On June 3, 2010, this Court entered its Notice of Court Practice upon Notice of Settlement, which stated:

> THE PARTIES are hereby notified that all papers related to the settlement reached between the parties, including any order of dismissal stating specific terms and conditions, must be received by this Court by June 18, 2010. If such papers are not filed by this deadline, the pending claims between the parties will be dismissed without further notice.

(D.E. 458.) As of June 18, 2010, no settlement papers were filed. Accordingly, it is

ORDERED AND ADJUDGED that this Case is DISMISSED. It is further

ORDERED AND ADJUDGED that the Status Conference set for June 23, 2010 is CANCELLED.

DONE AND ORDERED in Chambers at Miami, Florida, this 21st day of June, 2010.

/s/ URSULA UNGARO
URSULA UNGARO
UNITED STATES DISTRICT JUDGE

copies provided: counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 07-22015-UNGARO

IN RE: WEST CARIBBEAN AIRWAYS
CREW MEMBERS

JOINT NOTICE OF SETTLEMENT

Plaintiffs and Defendants hereby advise the Court that they have settled the case, and are currently preparing all paperwork needed to conclude the settlement. A Stipulation for Dismissal with prejudice will follow.

Based on this settlement, the Parties request that the Court administratively close the case, but reserve jurisdiction to address the lien filed by Motley Rice, and to effectuate or enforce the settlement.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 1, 2010, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record on the attached Service List in the manner specified either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

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Fed. R. Civ. P. 60—Relief from a Judgment or Order

* * *

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding.

On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

(c) Timing and Effect of the Motion.

(1) Timing.

A motion under Rule 60(b) must be made within a reasonable time—and for reasons

(1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

(2) Effect on Finality.

The motion does not affect the judgment's finality or suspend its operation.

* * *

28 U.S.C. § 1407 Multidistrict litigation

(a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: *Provided, however*, That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

* * *

169 (3)

No. 08-1569

Supreme Court, U.S.

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

SYLVIA BAPTE, Individually and as personal representative of the Estate of Christiane Bapte, deceased, STEPHANIE ISABELLE BAPTE, MARYVONNE BAPTE, ET AL.,

Petitioners,

— v —

WEST CARIBBEAN AIRLINES, S.A., a Colombian corporation, NEWVAC CORPORATION, a Florida corporation, GO 2 GALAXY, INC., a Florida corporation,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

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TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

I. THE SETTLEMENT OF THE CREW CASE IN THE DISTRICT COURT SUPPORTS THE GRANT OF RELIEF 3

II. THE MANDATORY LANGUAGE OF THE MMTJA AND THE LEGISLATIVE INTENT BEHIND THE MMTJA WERE COMPLETELY IGNORED 5

A. What part of "shall promptly notify" was discretionary? 6

B. How did the District Court create separate proceedings? 8

C. How could "shall be permitted to intervene" not confer a right of intervention? 9

III. PETITIONERS DID NOT WAIVE THEIR TIMELY-PRESENTED MMTJA ARGUMENTS 11

A. Part One: Confusion 11

B. Part Two: The Illusion 12

CONCLUSION 14

TABLE OF AUTHORITIES

Cases: PAGE

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 6

DirecTV, Inc. v. Brown, 371 F.3d 814 (11th Cir. 2004) 7

Food and Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) 6

Gondeck v. Pan Am. World Airways, Inc., 382 U.S. 25 (1965) 2, 3, 4

Mausolf v. Babbitt, 125 F.3d 661 (8th Cir. 1997) 4

N.C.O. Assn. of the U.S. v. Army Times Pub. Co., 637 F.2d 372 (5th Cir.1981), *modified on other grounds and reinstated*, 650 F.2d 83 (5th Cir.1981) . 10

Pierce v. Cook & Co., 518 F.2d 720 (10th Cir. 1975) 2, 3, 4

Pierre-Louis v. Newvac Corp., 584 F.3d 1052 (11th Cir. 2009), *reh'g denied* (Dec. 30, 2009) 9

Purcell v. BankAtlantic Financial Corp., 85 F.3d 1508 (11th Cir. 1996) 4

Sierra Club v. Espy, 18 F.3d 1202 (5th Cir. 1994) 12

PAGE

Sweeney v. Athens Reg. Med. Cntr.,
917 F.2d 1560 (11th Cir. 1990) 10

Swint v. Chambers County Comm'n,
514 U.S. 35 (1995) 9

United Mine Workers of America v. Gibbs,
383 U.S. 715 (1966) 2

Wallace v. Louisiana Citizens Prop. Ins.,
444 F.3d 697 (5th Cir. 2006) 11

Statutes:

28 U.S.C. §1369 ..... *passim*

28 U.S.C. §1407 7

Other Authorities:

Fed. R. Civ. P. 42 2

Fed. R. Civ. P. 60 ..... 2, 3, 5

H.R. 107-14 (2001) 6

Manual for Complex Lit., §20.131
(4th ed. 2009) 7

INTRODUCTION

All 160 people aboard WCA Flight 708 died when it crashed, inextricably linking all resultant claims through a common set of facts. Applying the Multiparty Multiforum Trial Jurisdiction Act of 2002 (the "MMTJA" codified 28 U.S.C. §1369) to these facts should have given *all* of the victims equal access to relief, but it did not. The District Court, which stated that it was at all times exercising 28 U.S.C. §1369 jurisdiction, granted the Passengers and Crew disparate relief when it divided them into two separate proceedings, with the Colombian Crew defeating all *forum non conveniens* ["FNC"] challenges and ultimately settling their case in the District Court, but only after the French Passengers were dismissed to Martinique for FNC. This Petition is the first opportunity for this Court to address the MMTJA, while it also addresses whether the Petitioners should have been granted Rule 60(b) equitable relief and the disparate treatment Petitioners received. Petitioners seek the due process that should have been afforded to them under the MMTJA.

The MMTJA grants all claimants who could not bring an original proceeding the "right" to intervene their claims, regardless of the legal theories involved, into any established §1369 proceeding—even if they could not establish one themselves. 28 U.S.C. §1369(d). So, once the Crew of Flight 708 established a 28 U.S.C. §1369 proceeding in the District Court, all other victims with claims arising from the same accident should have been granted the right to intervene into that proceeding by operation of 28 U.S.C. §1369(d). As victims of the same accident as the Crew, Peti-

tioner Passengers were entitled to intervene under §1369(d), but they needed relief from the prior FNC dismissal of their Montreal Convention claims before the Passengers could join those claims into the Crew Members' proceeding. Despite the Passengers' request for Rule 60(b)(5) and (6) Relief from the FNC dismissal based on *Gondeck v. Pan Am. World Airways, Inc.*, 382 U.S. 25 (1965), *Pierce v. Cook & Co.*, 518 F.2d 720 (10th Cir. 1975), and the commanding language of the MMTJA, and despite the fact that the prior dismissal was a non-merits dismissal, the Courts below denied Petitioners any relief thereby preventing any intervention into the Crew Members' established MMTJA proceeding.

Rule 42 of the Federal Rules of Civil Procedure favors adjudicating all factually related claims in one proceeding. *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 724 (1966). The MMTJA furthered this general principle by requiring Courts to aggregate all pending claims resulting from a single, qualifying disaster into one proceeding through the Multidistrict Lititation process and to grant the mandatory right of intervention to each claimant who could not otherwise bring an original action. 28 U.S.C. §1369(d). Under the circumstances presented, and under both Rule 60(b) and the MMTJA, the failure to grant Rule 60(b) relief so that the Petitioners could subsequently intervene into the MMTJA proceeding established by the Crew conflicted with *Gondeck*, *Pierce*, and the unambiguous language of the MMTJA. Petitioners, whose 102 innocent relatives died in this single aviation disaster, deserved the same justice as the Crew. Rather

than address the legal issues and the plain language of the MMTJA, Respondents argued avoidance issues, took wide liberties with facts and time frames, and tried to rewrite the clear language of the MMTJA.

I.

THE SETTLEMENT OF THE CREW CASE IN THE DISTRICT COURT SUPPORTS THE GRANT OF RELIEF

The settlement and subsequent dismissal of the Crew case neither adversely impacted the viability of this Petition nor rendered it moot. While the Crew's secretive settlement attempted to prevent and moot further review of this case for Petitioners, their actions only highlighted the irreconcilable conflict between the Circuit Court's decision, the MMTJA, *Gondeck*, and *Pierce*. Contrary to Respondents' mootness claim, the discrepancy between the different relief which the District Court afforded the Passengers and Crew still remains actionable. The settlement did nothing to equalize the disparate relief afforded the Passengers and Crew. The Crew's settlement further exemplifies how the rulings below created different rules of law and inconsistent relief for the Passengers and the Crew. Ultimately, and based on established law, the settlement of the Crew case did not resolve or moot the issues of whether Petitioners were wrongfully denied Rule 60(b)(5) and (6) relief from the FNC dismissal of their claims, whether the Courts below improperly considered the MMTJA as "simply" a jurisdictional Act, or whether Petitioners were entitled to relief in the

U.S. District Court commensurate with that available to the Crew pursuant to *Gondeck* and *Pierce*.

While Respondents have claimed that no viable case remains into which Petitioners could intervene, neither they nor the District Court addressed the written objection that Petitioners filed in the Crew case—which contested any settlement which failed to reserve jurisdiction or protect Petitioners' interests.[1] (Opp. 13) The District Court dismissed the Crew case as a result of the settlement without reserving jurisdiction as to Petitioners' pending appeal. Petitioners have appealed that dismissal to the Eleventh Circuit Court of Appeals, and pursuant to the authority of *Purcell v. BankAtlantic*, 85 F.3d 1508, fn. 3 (11th Cir. 1996), and *Mausolf v. Babbitt*, 125 F.3d 661 (8th Cir. 1997), the viability of this appeal continues.[2] Despite Respondents' contention that "there is no case in which Petitioners could intervene", the Court in both *Purcell* and *Mausolf* previously disposed of the same "mootness" arguments made herein by reasoning that parties cannot be deprived of their independently viable claims under circumstances almost identical to those presented herein. If the Courts below erred and if Petitioners were improperly denied Rule

[1] The District Court's Order Denying Intervention [07-22015 DE 413] reasoned that the Petitioners' interests were "adequately protected . . . by the Crew Member Plaintiffs and their experienced counsel", although nobody protected Petitioners' interest in the settlement nor in the event of a successful appeal.

[2] *Rapte v. The Boeing Company, et al.*, Eleventh Circuit Court of Appeals Case No.: 10-13566-E.

60(b)(5) or (6) Relief, then Petitioners still remain entitled to relief in the District Court to pursue their claims. In sum, the settlement of the Crew case did not extinguish the pending controversy nor did it render this Petition moot.

II.

THE MANDATORY LANGUAGE OF THE MMTJA AND THE LEGISLATIVE INTENT BEHIND THE MMTJA WERE COMPLETELY IGNORED

The Courts below erred by relegating the language of the MMTJA from mandatory undertakings to discretionary acts.[4] Ultimately, this gave the Crew inequitable access to better and more complete procedural and substantive relief than Petitioners. The very purpose of the MMTJA was to prevent same. Respondents either avoided the plain and clear language of the MMTJA or they took positions antagonistic to both the MMTJA and the clear Congressional intent behind it, to support the illogical rulings made by the Courts

[4] The District Court issued what was tantamount to a *sua sponte* Order which denied Petitioners any relief before a response to Petitioners' Motion for Rule 60(b) Relief was filed. The District Court did not consider Petitioners' Motion untimely, but instead denied it based on extraneous information not contained in the record, which it buttressed with unfounded speculation about Petitioners' ulterior motives and best interests. Ultimately, the District Court relegated the MMTJA from being a sweeping Congressional reform intended to consolidate all claims resulting from a catastrophic single accident through the determination of liability to "simply" a jurisdictional act. [App. 5a.]

below. Respondents' obfuscation of the MMTJA and its legislative history is telling.

Congress specifically intended for the MMTJA to consolidate *all cases and claims* arising from a single catastrophic accident into one proceeding. H.R. 107-14 at 4-6 (2001) ("*Current efforts to consolidate all State and Federal cases related to a common disaster are incomplete* because current Federal statutes restrict the ways in which consolidation can occur—apparently without any intention to limit consolidation.") The Courts below should have construed the MMTJA in a manner which favored consolidation of all Flight 708 claims into one master MDL proceeding, but they did not. *See e.g., Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 126 (2000) (Courts "must give effect to the unambiguously expressed intent of Congress") (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984)). By citing to neither the MMTJA nor to its legislative history, Respondents tacitly conceded these errors.

A. What part of "shall promptly notify" was discretionary?

All of the Flight 708 cases invoked the District Court's 28 U.S.C. §1369 jurisdiction (App. 9a), which meant that the District Court erred at the outset of this litigation when it disregarded 28 U.S.C. §1369(e) ("A district court in which an action under this section is pending *shall promptly notify the judicial panel on multidistrict litigation* of the pendency of the action"). Respondents have argued that "no such notice was

required" by citing to the permissive MDL mechanism contained in 28 U.S.C. §1407 rather than to the mandatory 28 U.S.C. §1369(e). (Opp. p. 25.) Respondents then relied exclusively on the general function of the JPMDL instead of the clear language of the MMTJA or its procedural history, and without any regard for what would have occurred after the JPMDL assembled a single MDL proceeding for Flight 708 victims. Respondents ignored the mandatory term "shall" in 28 U.S.C. §1369(e),[4] which removed any discretion regarding the District Court's duty to notify the JPMDL, and instead argued that such notification was permissive based on 28 U.S.C. §1407(a) (". . . *such actions may be transferred* to any district for coordinated or consolidated pretrial proceedings"). However, the enactment of a specific provision in 28 U.S.C. §1369 removed any discretion given to litigants under 28 U.S.C. §1407 to request an MDL proceeding by imposing a mandatory duty upon District Court Judges to "promptly notify" the Judicial Panel on MDL of the pendency a §1369 proceeding. *Manual for Complex Lit.*, §20.131 (4th ed. 2009). Respondents' reliance on 28 U.S.C. §1407(a) was wholly misplaced and cannot supplant the unambiguous mandatory provisions of the MMTJA.

Had the District Court "promptly" notified the JPMDL, a single MDL judge would have addressed all pre-trial issues and adjudicated issues of common liability uniformly in this case. H.R. 107-14 at 2. The single MDL Judge presiding

[4] *See DirecTV, Inc. v. Brown*, 371 F.3d 814, 817 (11th Cir. 2004) (recognizing difference between use of mandatory "shall" and permissive "may").

over the Flight 708 MDL proceeding also would have adjudicated the issue of FNC as a threshold matter concerning the proceeding *as a whole*, for all Flight 708 victims, rather than separately for the Passengers and the Crew. (*But see* Opp. 25.) Accordingly, the District Court's initial error was not harmless. Once the District Court omitted the first mandatory step towards aggregating all Flight 708 claims into one proceeding, it injected the remainder of the proceeding with error.

B. How did the District Court create separate proceedings?

Before any FNC challenge, and only weeks after the first of the Crew cases was filed, Defendant, Newvac Corporation, urged the District Court to segregate the claims asserted on behalf of the Passengers and Crew into different consolidated proceedings based upon the types of claims advanced. [07-22018 DE 26.] In contrast, the Crew advocated for the creation of one all-inclusive proceeding; pointing to the common issues of liability and causation. [07-22018 DE 27.] Despite the Crew's arguments and despite the MMTJA, the District Court established a separate proceeding for the Crew on August 30, 2007 based on the type of claims asserted. [07-22015 DE 23.] The distinctions drawn by the District Court were not material then, nor were they material to Petitioner's Motion for Rule 60(b) Relief. Although one of the critical purposes of the MMTJA was to consolidate *all claims* into one §1369 proceeding without regard for the type of claim to be joined, the District Court repeatedly utilized these immaterial distinctions in the causes of action brought by the Passengers and Crew to deny Petitioners equal

treatment. The MMTJA clearly grants anyone with a "claim" arising from the accident the right to intervene without regard for the type of claim raised.

The Order which created the separately consolidated Crew case imposed a daunting impediment to any subsequent attempt by Petitioners to intervene or join it. As an interlocutory order, neither was it subject to immediate appellate scrutiny. *Swint v. Chambers County Comm'n*, 514 U.S. 35, 43-48 (1995). Respondents addressed none of these procedural nuances.

C. How could "shall be permitted to intervene" not confer a *right* of intervention?

On November 9, 2007, just over two months after the District Court refused to consolidate the Passenger and Crew cases, it dismissed Petitioners' Montreal Convention claims for FNC. [App. 4, App. 5.] That dismissal, a non-merits dismissal, prevented Petitioners from bringing their claims in the District Court "as an original matter". 28 U.S.C. §1369(d). Petitioners appealed that dismissal to the Eleventh Circuit Court of Appeals, but the Circuit Court did not render its decision on whether FNC applied to the Montreal Convention until October 8, 2009. *Pierre-Louis v. Newvac Corp.*, 584 F.3d 1052 (11th Cir. 2009), *reh'g denied* (Dec. 30, 2009.)[5]

[5] During the intervening two years, the parties to the Crew case conducted discovery and litigated only the issue of FNC.

In the interim, the District Court denied the first of *two* FNC challenges to the Crew case on September 30, 2008. It was not until May 14, 2009 that the District Court disposed of the second and final FNC challenge of the Crew case which established the requisite jurisdiction for a §1369 proceeding for the claims of all of the victims of Flight 708. [App. 3.] It was this dramatic change in circumstances which occurred on May 13, 2009 which prompted Petitioners to pursue Rule 60(b)(5) and (6) relief so that they could intervene into the established §1369 proceeding.[6] Pursuant to the District Court's ancillary jurisdiction over all other Flight 708 claims, there could be no further FNC challenges regardless of who sought to join the Crew case by way of intervention or consolidation. *Sweeney v. Athens Reg. Med. Cntr.*, 917 F.2d 1560 (11th Cir. 1990); and *N.C.O. Assn. of the U.S. v. Army Times Pub. Co.*, 637 F.2d 372, 373 (5th Cir.1981), modified on other grounds and reinstated, 650 F.2d 83 (5th Cir.1981).

[6] 28 U.S.C § 1369(d) allows intervention of all others with 'claims' arising from the same accident. As Petitioners' prior FNC dismissed was a non-merits dismissal, they moved to intervene into the MMTJA proceeding established by the District Court when it denied the Crew's second FNC challenge. Ultimately it was the District Court's own ruling that opened the door to the MMTJA proceeding and there was absolutely nothing 'subversive' about Petitioners' moving to intervene as Congress intended.

III.

PETITIONERS DID NOT WAIVE THEIR TIMELY-PRESENTED MMTJA ARGUMENTS

Respondents employed a two-part "parlor trick" to contend that Petitioners waived their MMTJA arguments, the first part of which attempts to raise confusion about the language and significance of the MMTJA, with the second component making it appear as though Petitioners should have raised the MMTJA issue earlier. Behind this "parlor trick" is Newvac Corporation, the common defendant in both the Passenger and Crew cases who orchestrated the different procedural paths taken by the Passengers and Crew.

A. Part One: Confusion.

The MMTJA conferred original jurisdiction on the District Court by lowering the threshold minimum diversity requirements, and the District Court admittedly exercised that jurisdiction when presiding over all Flight 708 proceedings. 28 U.S.C. §1369(a); [App. 5a.] Respondents, however, confused "original" jurisdiction with "anchor" or "piggy-back" jurisdiction. The Fifth Circuit Court of Appeals discussed this distinction in the context of MMTJA when it explained that "piggy-back" or ancillary jurisdiction confers victims who were otherwise unable to avail themselves of a remedy in a District Court with the ability to rely on the "piggy-backing jurisdiction on the district court's original jurisdiction under §1369(a)". *Wallace v. Louisiana Citizens Prop. Ins.*, 444 F.3d 697, 702 (5th Cir. 2006). Thus, Petitioners should have

been entitled to "piggy-back" their claims onto the jurisdiction granted by the District Court to the Crew, but the District Court erroneously denied Petitioners the ability to utilize the "piggy-back" ancillary jurisdiction conferred on them. Since Petitioners could not have attempted to join the Crew case sooner for those reasons discussed above, and since any attempt at intervention before May 13, 2009 would have been premature, Petitioners' efforts were by all measures timely. *See Sierra Club v. Espy*, 18 F.3d 1202 (5th Cir. 1994).

B. Part Two: The Illusion.

Petitioners served Appellants' Consolidated Initial Brief in the Eleventh Circuit Court of Appeals in the *Pierre-Louis* matter on March 24, 2008, *before* the District Court issued either of its FNC rulings in the Crew case, and when they could not predict how the District Court would later treat any FNC challenge to the Crew's claims. Respondents nonetheless made it seem as though Petitioners should have included arguments predicated on 28 U.S.C. §1369 in the appeal of the FNC Order of Dismissal (which resulted in the *Pierre-Louis* decision). The deception in that argument is glaring, as Petitioners had no MMTJA arguments to make until May 13, 2009, when the District Court first established the §1369 proceeding for victims of the Flight 708 disaster. In fact, the Briefs for that FNC appeal were already filed long before the Crew even established the §1369 proceeding on May 13, 2009. Petitioners were not able to avail themselves of 28 U.S.C. §1369(d) and seek to "piggy-back" their claims on the jurisdiction established by the Crew until *after*

the Crew established "anchor" jurisdiction. As such, Petitioners were timely and nothing was waived. [App. 3.] To date, no Court has considered Petitioners' efforts untimely if measured from May 13, 2009. Ultimately, Respondents' efforts at suggesting that Petitioners should have been clairvoyant and known what or how the District Court would later dispose of the FNC challenge to the Crew case, and at using that as a basis for their waiver and estoppel arguments, again demonstrates the lack of validity in Respondents' arguments.

CONCLUSION

Despite Respondents' contentions, there are conflicts that are ripe for adjudication, not only between Appellate Courts, but with prior decisions of this Court. Respondents ignored significant procedural events for which they were responsible, and they gave no credence and no ink to the specific language of, or the Congressional intent behind the MMTJA. For the foregoing reasons, the Petition for Writ of Certorari should be granted.

Respectfully submitted,

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